



1997

Sexual Character Evidence in Civil Actions: Refining the Propensity Rule


Jane H. Aiken

Georgetown University Law Center, jha33@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1403>

1997 Wis. L. Rev. 1221-1273 (1997)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), and the [Sexuality and the Law Commons](#)

ARTICLE

SEXUAL CHARACTER EVIDENCE IN CIVIL ACTIONS: REFINING THE PROPENSITY RULE

JANE HARRIS AIKEN*

*Who will believe thee, Isabel?
My unsoiled name, th' austereness of my life,
My vouch against you, and my place i' th' state,
Will so your accusation overweigh
That you shall stifle in your own report
And smell of calumny. . . .
Say what you can, my false o'erweighs your true.¹*

*"With only one accuser . . . and everyone else saying
something contrary, the public is doubtful. But with
two accusers, no matter what the second's credibility,
the public really listens."²*

* Professor of Law, Washington University School of Law. I thank the University of South Carolina for summer research support and Washington University for research support and a reduced teaching load during the writing of this article. I also want to thank Katherine Goldwasser and Richard Kuhns, evidence experts, who guided me in the production and refinement of the ideas, the Washington University faculty for their intellectual support through the brown bag series and particularly, Neil Bernstein, Kathleen Clark, Clark Cunningham, Barbara Flagg, Brad Joondeph, Daniel Keating, Pauline Kim, Ronald Levin, Karen Tokarz and Peter Wiedenbeck. Thanks also go to Annette Appell, James Flanagan, and Abbe Smith. I am grateful to my research assistants, Brooke Floren and Benjamin Carter, for their thoughtful work.

1. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 4, in WILLIAM SHAKESPEARE: THE COMPLETE WORKS 414 (Alfred Harbage ed., Penguin Books 1969) (Angelo's response to Isabella, a nun who pleads with Angelo not to execute her brother, when she claims that she will tell the world that Angelo has proposed she have sex with him to buy her brother's life).

2. JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 324 (1994) (quoting David Demarest, White House Communications Director throughout the Clarence Thomas hearings, during a Republican strategy meeting in which the participants discussed ways to prevent another woman from testifying about Clarence Thomas's alleged sexually harassing behavior toward her).

I. INTRODUCTION

When claims of sexual misconduct are made, two threads are often seen in the kinds of questions raised: Did she "invite it," and has he ever done it before?³ The way these questions are handled can determine the outcome of a sexual misconduct case. In 1995, Congress weighed in on whether these questions could be asked in civil cases in federal court and adopted two significant changes to the rules of evidence. One, revised Rule 412,⁴ extends "rape shield" protection to civil actions that claim sexual misconduct, including sexual harassment. The other, new Rule 415,⁵ allows plaintiffs to offer evidence of a defendant's commission of

3. Throughout this Article I use the female pronoun to refer to the plaintiff and the male pronoun to refer to the defendant. Although the vast majority of sexual misconduct cases reflect that assignment of sexes, I recognize that is not always true. I use the specific pronouns to make the analysis easier to read and follow. The rules of evidence do not designate the sex of alleged victims or perpetrators. Therefore, in those cases where the genders are not as expected, the rules will still operate as analyzed in this article.

4. The portion of Rule 412 governing civil actions reads as follows:

(a) Evidence generally inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.—

(1)

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c)

FED. R. EVID. 412.

5. Rule 415 states in relevant part:

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault

prior similar acts to prove that he is the kind of person who engages in such sexual misconduct, and thus to imply that he engaged in it on the occasion in question.⁶

If courts follow the rules and the Advisory Committee Notes interpreting Rules 412 and 415, a plaintiff's sexual misconduct case today will look very different than it would have just three years ago. Instead of voluminous testimony regarding the plaintiff's dress and personal fantasies, the record might include testimony about the defendant's prior misconduct. Instead of broad discovery into the plaintiff's sex life, discovery might be directed toward prior sexual misconduct by the defendant. The evidence might instead give the trier of fact a very different picture of the plaintiff as a victim, the defendant as a perpetrator, and, if offered under a theory of respondeat superior, might significantly affect the corporate entity's financial liability for the defendant's behavior.

Of the two changes, the more dramatic by far is new Rule 415. Previously, the question of whether the defendant had engaged in prior sexual misconduct could not be asked to corroborate the plaintiff's story. This left jurors free to assume that the defendant was "Mr. Clean."⁷ The Rules of Evidence made it virtually impossible for a plaintiff to correct this assumption. New Rule 415 purports to lift that restriction, at least to some extent. Under this rule, evidence of certain types of prior acts⁸ may be "considered for its bearing on any matter to which it is relevant."⁹ Thus, in theory, the plaintiff may offer evidence of such acts

or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

FED. R. EVID. 415. The Rule deals with *sexual assault* but the definition includes a broad range of activities not commonly thought to be sexual assault. See *infra* part II.B.

6. The bar to this prior act evidence is codified in Rule 404(a) which states:

- (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

.....

FED. R. EVID. 404(a).

7. See, e.g., Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 43 (1982); *infra* part V.A.2.

8. The Rule applies in sexual assault or child molestation cases. See *infra* notes 29-33 and accompanying text.

9. FED. R. EVID. 413(a); see, e.g., *United States v. Cunningham*, 103 F.3d 553, 556 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1481 (1997) (noting that rules 413, 414, and 415 were added to make evidence of similar sexual crimes or acts expressly admissible without regard to Rule 404(b)); *United States v. Roberts*, 88 F.3d 872, 876 (10th Cir. 1996) (relying on Rule 413's historical notes to allow general propensity evidence); *United States v. Akram*, No. 97 CR 78, 1997 WL 392220, at *2 (N.D. Ill. July 8, 1997) (discussing the relevance standard to be used with Rule 413).

to show that the defendant is the sort of person who would engage in sexual misconduct, and argue that conclusion to the jury.¹⁰

Despite this potential for dramatic change, revised Rules 412 and 415 have not had such an impact. An analysis of how Rule 412 has been applied in civil cases reveals a mixed response to the goals of the rule. Courts are more willing to be suspicious of broad inquiries into a plaintiff's sexual history even at discovery.¹¹ At the same time, they are finding new relevance for such evidence when evaluating damage claims.

10. Senator Dole said on the floor of the Senate: "I think if somebody is a repeat offender, if you brought in eight or nine women, for example . . . and he had one offense after another, it would be probative." 139 CONG. REC. S15020-01, S15073 (1993).

11. Rule 412 governs the admissibility of evidence *at trial* and therefore does not directly govern a party's behavior during the discovery process. This is a significant gap in the rule. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5393.1 (1997). Far more victims go through the discovery process than go to trial. Furthermore, the abuses are likely to be greater at this stage since discovery occurs without the presence of a judge to protect the victim. The drafters were aware that the same concerns at trial existed during the discovery process and urged that such wholesale investigations into the plaintiff's sexual activities and predisposition be curbed throughout the litigation. The Advisory Committee's Note to revised Rule 412 urges judges to make liberal use of Rule 26(c) protective orders and not to undermine the intent of the rule through the discovery process. The note states that "[c]ourts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery." FED. R. EVID. 412 advisory committee's note (c). Unfortunately, the burden remains on the plaintiff to show good cause for a protective order against abusive discovery at a time in which the relevance rules are relaxed. *See* FED. R. CIV. P. 26(c).

Thus federal courts have considerable power, should they choose to exercise it, to grant protective orders to limit this line of defense. There has already been considerable case law supporting the applicability of Rule 412 to discovery. *See, e.g.,* *Holt v. Welch Allyn, Inc.*, No. 95-CV-1135 (RSP/GJD), 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997); *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179 (D. Md. 1997); *Barta v. City & County of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996); *Stalnaker v. Kmart Corp.*, No. Civ. A. 95-2444-GTV, 1996 WL 397563 (D. Kan. July 11, 1996); *Sanchez v. Zabihi*, 166 F.R.D. 300 (D.N.M. 1996); *Ramirez v. Nabil's, Inc.*, No. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995); *Burger v. Litton Indus., Inc.*, No. 91 Civ. 0918 (WK)(AJP), 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995); *Alberts v. Wickes Lumber Co.*, No. 93 C 4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995). These cases all recognize that Rule 412 is a rule of admissibility, but point to the Advisory Committee's Note to support a closer scrutiny of discovery requests and more permissive grants of protective orders. At the discovery stage, however, the protections of Rule 412 must be invoked by a motion for protective order brought by the plaintiff. At trial, the defense bears the burden of meeting notice requirements and demonstrating admissibility of the evidence. FED. R. EVID. 412(c). If the plaintiff does not move for such protection, there appears to be no bar to seeking the information as long as the defense has a good-faith belief that such information could lead to admissible evidence. *See* FED. R. CIV. P. 26.

Case law after the implementation of amended Rule 412 suggests that if the plaintiff asserts a claim for mental or emotional damages, her sexual history and predisposition are likely to be discoverable and perhaps admissible.¹²

While Rule 412 has thus achieved, at best, inconsistent results, Rule 415 has encountered especially blunt resistance. Judges simply are not admitting sexual character evidence offered to show general propensity.¹³ When they encounter such evidence in civil cases, courts invoke discretionary authority to exclude it.¹⁴ This approach runs counter to the plain meaning of the rule and substantially limits its impact. This Article explores the reach of Rule 415, analyzes how courts have limited its effect, and suggests how the rule can be modified to ensure it provides the corroboration necessary for achieving justice in sexual misconduct cases. Part II assesses the potential impact of Rule 415. Part III traces the development of Rule 415 and related rules regarding character evidence in sexual misconduct cases. Part IV discusses how courts are assessing probative value and prejudice when evidence of general propensity to engage in sexual misconduct is admitted. Together, these parts of the analysis demonstrate the need for a fresh look at the problem addressed by Rule 415. Part V provides that look. It develops a principled way of approaching the refinement of Rule 415, addressing concerns about lack of symmetry (the notion that evidence of a defendant's sexual character is admissible but comparable evidence about a plaintiff is not) and demonstrating that those concerns are misplaced. The discussion concludes with a proposed revision to Rule 415 which would continue to make evidence of a defendant's sexual character admissible—indeed, would allow it in a wider array of civil cases—while providing some needed guidance about when such evidence should be admitted.

II. RULE 415

A. The Character Bar

A fundamental principle of Anglo-Saxon jurisprudence is that a person is tried for his specific acts, not for his bad character. This principle is so strong that it prevents the admission of character evidence even if that evidence is relevant to the acts charged.¹⁵ The common law

12. See *Bottomly v. Leucadia Nat'l* 163 F.R.D. 617, 621 (D. Utah 1995); *Ramirez*, 1995 WL 609415, at *3; *Alberts*, 1995 WL 117886, at *3-4.

13. See *infra* notes 83, 89 and accompanying text.

14. *Id.*

15. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529 (1994). In European proceedings such evidence is

propensity rule has its roots in the law of England:¹⁶ by 1721, the character bar was the law of the land.¹⁷ Many pre-Revolutionary War colonial courts followed the English courts in barring the use of general propensity evidence.¹⁸ American common law maintained a blanket rule against offering evidence to argue action in conformity with character, but carved out a number of circumstances in which prior acts could be offered for non-propensity purposes such as motive, intent, absence of mistake, common scheme or plan, and identity.¹⁹ The Supreme Court identified the underlying concerns that motivated the character bar in *Michelson v. United States*.²⁰ Explaining why common law had disallowed the admission of evidence of a defendant's evil character to demonstrate that he did the alleged act, Justice Jackson stated: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge."²¹

The Federal Rules' overriding principle is that probative evidence is normally admissible unless there is a good reason not to admit it. Like the common-law courts, the Federal Rules incorporate a suspicion of general propensity evidence. Rule 404 generally will not allow a proponent to introduce evidence in any form (opinion, reputation or specific acts) showing that a person has a particular character trait if the reason for introducing it is to argue that the person acted in conformity

routinely admitted. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT NO. 4, *The Admission of Criminal Histories at Trial* (1986), reprinted in 22 U. MICH. J.L. REFORM 707, 751 (1989) [hereinafter OFFICE OF LEGAL POLICY].

16. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713 (1981). Cases as early as 1684 reflected a growing support for the character bar. See *Hampden's Trial*, 9 How. St. Tr. 1053 (K.B. 1684). In applying the rule against the admission of character evidence in *Harrison's Trial*, 12 How. St. Tr. 834 (Old Bailey 1692), Lord Chief Justice Holt stated: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not be; that is nothing to the matter." *Id.* at 864.

17. 4 WILLIAM HAWKINS, A TREATISE FOR THE PLEAS OF THE CROWN 205-06 (London 1721), cited in Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 668 & n.109 (1993).

18. Louis M. Natali, Jr. & R. Stephen Stigall, *Are You Going to Arraign His Whole Life? How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 15 (1996).

19. *People v. Molineux*, 61 N.E. 286, 294-302 (N.Y. 1901).

20. 335 U.S. 469 (1948).

21. *Id.* at 475-76 (footnote omitted).

with the trait.²² This said, however, the character bar is not absolute. The rules allow admission of character evidence when sound policy demands it.²³

Rule 415 states in part:

In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered [for its bearing on any matter to which it is relevant]²⁴

22. Rule 404 states in part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" FED. R. EVID. 404(a). The concern that underlies the rules is the risk the fact finder will rule against a party because he or she is a "bad person," regardless of the facts of the instant case. McCormick explains this concern:

[E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how he acted . . . in the matter in question. . . . Yet, evidence of character in any form—reputation, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct

EDWARD W. CLEARY, MCCORMICK ON EVIDENCE §188, at 554 (3d ed. 1984).

23. Recognized exceptions include impeachment by a prior conviction, based on the idea that because of that prior conviction, the person impeached is the kind of person who would lie on the witness stand. One can use the prior conviction to show that the person has the propensity to lie but not the propensity to engage in similar conduct. Indeed, if the prior conviction is very similar to the charged conduct, the argument that it is more prejudicial than probative may succeed. *See* FED. R. EVID. 609(a). A person can also be impeached by prior bad acts that have not been the subject matter of a conviction if the acts are probative of truthfulness. Again, this form of impeachment may be subject to an objection that the prejudicial effect outweighs the possible probative value. *See* FED. R. EVID. 608(b).

A defendant in a criminal case may offer opinion and reputation evidence that suggests he has a character trait that belies the charged conduct. If the defendant does so, the prosecutor may offer opinion or reputation evidence to rebut the defendant's claim. *See, e.g., State v. Banks*, 593 N.E.2d 346, 349 (Ohio Ct. App. 1991). Uncharged misconduct may also be offered if the relevance does not depend on general propensity under Rule 404(b). Permissible purposes include showing knowledge, identity, plan, preparation, opportunity, motive, intent, absence of mistake, or accident. FED. R. EVID. 404(b). *But see* Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981) (noting that the difference between what is prohibited and what is permitted is unclear at best).

24. FED. R. EVID. 415(a) (referencing Rules 413 and 414 for the language that indicates that the evidence may be considered for its bearing on any matter to which it is relevant). Rule 415(b) requires that a party offering such evidence disclose the evidence

Rule 415 is thus a stark departure from the Anglo-Saxon evidentiary principle that we evaluate people on the basis of what they do, not who they are. As Senator Biden observed, it goes against "800 years of experience" about what evidence should be admitted as relevant.²⁵ Rule 415, by its terms, allows blanket admission of certain prior acts even if offered to show the defendant's character. Prior to Rule 415's enactment, courts struggled to find a non-character reason to admit a defendant's prior acts of sexual misconduct. They would typically rely on Rule 404(b), which enacts the common law exceptions to the ban against evidence of prior acts.²⁶ Though courts have been increasingly willing to admit evidence to show motive, opportunity, intent, plan, or absence of mistake,²⁷ character evidence has not been allowed.²⁸ However,

to the party against whom it is offered, including statements of the witnesses, at least fifteen days before the scheduled date of trial or at a later time if the court allows for good cause. FED. R. EVID. 415(b).

25. 139 CONG. REC. S15020-01, S15072 (1993). Though Senator Biden's reference was a bit inflated, the adversarial system has treated general propensity evidence with suspicion for at least 200 years. See Bryden & Park, *supra* note 15.

26. Rule 404(b) states in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

FED. R. EVID. 404(b). Some courts have used "lustful disposition" as a supposedly non-character reason for admitting prior acts of sexual molestation. See, e.g., *State v. Lachterman*, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) (affirming lower court's admission of prior sexual acts on a "depraved sexual instinct" theory), *cert. denied*, 503 U.S. 983 (1992). But see *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992) (abolishing Indiana's "depraved sexual instinct" exception to character evidence).

David Bryden and Roger Park discuss how courts manipulate Rule 404(b) to admit prior uncharged sexual offenses. They conclude that courts generally do not treat evidence of uncharged sex offenses differently from other crimes. They do note, however, that courts in a number of states are less likely to admit uncharged misconduct in acquaintance rape cases than in stranger rape or child abuse cases. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 560 (1994).

27. See, e.g., *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424 (7th Cir. 1986); *Horn v. Duke Homes*, 755 F.2d 599, 602 (7th Cir. 1985) (trial court admitted evidence of harasser's prior voluntary workplace affair and prior harassment to show that he used his supervisory power to "sexually exploit"); *Phillips v. Smalley Maintenance Servs., Inc.* 711 F.2d 1524 (11th Cir. 1983) (evidence of similar treatment of other employees indicates evidence of plan admissible under 404); *Webb v. Hyman*, 861 F. Supp. 1094 (D.D.C. 1994) (evidence of allegations of prior harassment by a particular defendant towards other women is admissible because it provides direct evidence of a contemporaneous hostile environment and concerned substantially similar behavior when compared to allegations by plaintiff, thereby providing evidence of intent); *Chonicki v.*

following the adoption of Rule 415, the proponent of prior acts evidence need not be concerned about the niceties of framing it to conform to the character bar. In cases that include sexual assault and child molestation, the new rules presumably allow plaintiffs to argue that "because he did this before, he probably did it this time."

B. Rule 415's Expansive Coverage

Rule 415's definition of sexual assault determines what actions will open the door to this kind of evidence, as well as what evidence can be used. The definition includes all crimes under federal or state law that involve:

[C]ontact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
... contact, without consent, between the genitals or anus of the defendant and any part of another person's body; ... deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person
... .²⁹

The definition appears to limit the rule to what is traditionally thought to be rape or felony sexual assault.³⁰

Wittekind, 381 N.W.2d 561, 564-65 (Wis. Ct. App. 1985) (evidence of four other incidents of harassment by alleged harasser admissible to show habit or routine practice where factually similar to the case at bar).

The struggle is often unsuccessful. *See, e.g., Kelly-Zurian v. Wohl Shoe Co.*, 27 Cal. Rptr. 2d 457, 463 (Cal. Ct. App. 1994) (court granted defendant's motion in limine to exclude any evidence of alleged sexual affairs of the alleged harasser and claims of sexual harassment against the alleged harasser with anyone other than the plaintiff); *Kresco v. Rulli*, 432 N.W.2d 764, 769 (Minn. Ct. App. 1988) (plaintiff offered evidence suggesting that defendant made a habit of sexually harassing women employees, court found no 404(b) issues toward which the evidence could be offered).

28. *See generally* EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* (1984). Courts often act as if "noncharacter" uses of specific evidence are logically distinct from offensive uses of prior acts to prove action in conformity. The distinction is far from clear. Many permissible uses of specific-acts evidence rely on "character logic." *See, e.g., Ronald N. Boyce, Evidence of Other Crimes or Wrongdoing*, 5 UTAH B.J. 31, 37 (1977); Kuhns, *supra* note 23, at 781; Reed, *supra* note 16, at 714.

29. FED. R. EVID. 413(d)(2)-(4).

30. If any state happens to criminalize the behavior described above, that evidence would be admissible even if the activity was not a federal crime or a crime in the state where the alleged events occurred. The legislative history is not clear whether the alleged perpetrator must have committed the act in the state in which it was subject to criminal penalty, or if the definition includes all behavior that is criminalized in states even if not

However, the definition of "sexual assault" also includes "any conduct proscribed by chapter 109A of title 18, United States Code."³¹ This substantially expands the range of behavior that will be admissible. Besides including aggravated sexual abuse, it also includes non-aggravated sexual abuse: causing or attempting to cause another to engage in a sexual act by placing the person in fear. In the "non-aggravated" situation, it encompasses the fear of being fired or receiving disadvantageous treatment for failure to comply.³² The Code also criminalizes abusive sexual contact. Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."³³ Wright and Graham describe this definition as "so broad that it includes conduct not often thought of as criminal in some quarters; e.g., horseplay in which one co-worker 'gooses' another."³⁴ The definition notably does not include behavior that might result in a sexually hostile work environment such as sexual

criminalized in the state in which the defendant resides. However, in the discussion of their proposed alternative to Rules 413-415, the Evidence Advisory Committee on Evidence Rules struck the reference to state law as "unnecessarily confusing and restrictive." FED. R. EVID. 404(a)(4) advisory committee's note. They explained that as long as the conduct was of the sort described as criminal under federal law, it was admissible "regardless of whether the actor was subject to federal jurisdiction." *Id.* This suggests that acts which are criminal somewhere may be usable under Rule 415. This is also supported by the interpretation of Rule 404(b). Rule 404(b) evidence is not limited to crimes. Even if the act was not criminal where it was done, it may still qualify as an act or wrong for the purpose of the rule. 22 WRIGHT & GRAHAM, *supra* note 11, § 5239, at 454-59.

31. FED. R. EVID. 413(d)(1).

32. 23 WRIGHT & GRAHAM, *supra* note 11, § 5414, at 291 (Supp. 1997). Wright and Graham note that sexual abuse includes what they call "petty rapes." They define petty rapes as sexual activity involving "coercion employed by men who have the power to hire and fire women to achieve sex not spontaneously offered them." *Id.* § 5382, at 517 n.41 (1980). They conclude that such employer coercion constitutes "petty rape" by noting that the federal law contains a prohibition against sexual activity between a prisoner and guard regardless of consent. The authors state:

In both cases, the perpetrator is in a position of power such that any "consent" by the victim is or ought to be highly suspect. If the legislature was willing to make this a crime with respect to prison guards without any evidence of threats or fear, this makes it more likely that they would have also intended to cover the case of the corporate executive who puts a subordinate in "fear" by an explicit threat.

Id. § 5414, at n.46 (Supp. 1997).

33. 18 U.S.C.A. § 2246(3) (West Supp. 1997).

34. 23 WRIGHT & GRAHAM, *supra* note 11, § 5414, at 291 (Supp. 1997) (footnotes omitted); see *infra* text accompanying notes 175-77.

comments and propositions. Attempts and conspiracy to commit such acts would also be admissible.³⁵

The Code's definition of sexual assault increases the breadth of Rule 415 and its potential impact. It greatly enlarges the number of claims in which sexual character evidence could be offered because the rule applies to more cases than just damage suits over criminal acts of sexual assault. Typical tort actions arising from sexual misconduct include claims of assault, battery, intentional infliction of emotional distress, false imprisonment, seduction, sexual harassment, transmission of sexually transmitted disease, negligent entrustment and negligent supervision. Sexual harassment suits often include allegations of unwanted sexual touching (pinching bottoms, hands on breasts), thus invoking the possibility of admission of other similar acts against harassers and their employers.³⁶ Because Rule 415 will apply in sexual harassment cases in which there has been physical contact, it is likely to have a greater impact on the admission of evidence in federal courts than its companion rules 413 and 414.³⁷ Federal jurisdiction, so elusive for a damage action

35. FED. R. EVID. 404(a)(4)(C)(i).

36. Wright and Graham note that:

Rule 415 reaches most of the forms of physical sexual contact in the workplace for which employers are liable under Title VII of the Civil Rights Act under the rubric of "sexual harassment." The fanny-pinching executive as well as the package deliveryman who sexually assaults a housewife may provide the basis of a claim as to which Rule 415 is applicable.

23 WRIGHT & GRAHAM, *supra* note 11, § 5412B, at 351 (Supp. 1997) (footnotes omitted).

Congress did not anticipate that these rules might be usable against corporate defendants. There was no corporate lobby against Rule 415. *See id.* Analytically, Rule 415 refers to prior bad acts of an individual. Since most circuits have determined that there is no individual liability under Title VII, plaintiffs will be bringing their actions against corporations. The corporate entity might assert as a defense that it is not a "party" who allegedly committed the sexual misconduct, so evidence of the alleged perpetrator's prior acts should not be usable against the business. In *Cleveland v. KFC National Management Co.*, 948 F. Supp. 62, 65-66 (N.D. Ga. 1996), the court found that a corporate defendant should not be able to shield itself from character evidence offered for the purposes of Rule 415 by asserting that the corporation is not a "party" since Title VII prohibits liability from attaching to the actual "party." Wright and Graham suggest that "415 is largely a dead letter unless it can be used against organizations that are or can be insured against liability for the crimes of their employees or agents." 23 WRIGHT & GRAHAM, *supra* note 11, § 5414B, at 355 (Supp. 1997). Otherwise, Rule 415 would be inapplicable in the Title VII context, and that would be inconsistent with congressional intent. *Cleveland*, 948 F. Supp. at 65. The court therefore found that the prior acts of the employee were attributable to the employer through the doctrine of respondeat superior. *Id.* at 66.

37. There are few federal criminal actions for sexual assault or child molestation. On the other hand, the broadened definition of sexual assault is likely to make such evidence very useful in sexual harassment cases and in Violence Against Women Act

brought by the victim of rape, is readily available to victimized employees because Title VII confers such jurisdiction.³⁸ Sexual harassment cases are a substantial part of the federal docket.³⁹ Further, because a sexual harassment action can reach the deeper pocket of the employer, there may be more incentive to pursue the case.⁴⁰

The application of Rule 415 to sexual harassment cases is likely to come as a surprise both to proponents of the new rules and to affected parties. David Karp, Senior Counsel in the Office of Policy Development, United States Department of Justice, and author of these rules, has characterized a typical offender whose past history would be admissible under these rules as a member of "a small class of depraved criminals"⁴¹ with "the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him."⁴² Given the expansiveness of the definition of sexual assault and the numbers of sexual harassment cases filed annually, that small class of "depraved criminals" might be larger than Mr. Karp thinks. The rule's justification, though perhaps politically appealing when describing child molesters, loses much of its impact when describing a fanny-pinching sexual harasser in the workplace.⁴³

claims, a cause of action included in the same bill. No feminist organization made arguments in support of these rules. The choice not to argue in favor may have been partially political. Although there was considerable overlap between civil libertarians and feminists about the Violence Against Women Act, the coalition was not without its rough spots. Rules 413, 414, and 415 were ardently opposed by the ACLU and other civil libertarians. Feminist support for Rule 415 may have jeopardized the coalition needed to pass the portions of the bill that included the Violence Against Women Act.

38. The sponsors did not expect that the federal courts would entertain many such civil claims anticipating instead that the rules' larger role would be to provide a model for state rules. The sponsors noted: "The proposed new rules would apply directly in federal cases, and would have broader significance as a potential model for state reforms." 137 CONG. REC. 6031 (1991). Victims suing their rapists or molesters would have difficulty establishing federal jurisdiction even if they could find a deep pocket from which to exact damages.

39. According to the EEOC, the fastest growing area of employment discrimination is sexual harassment claims. In 1996, 15,342 complaints were filed, up from 6,127 in 1990. Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily; New Law Boosts Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1.

40. Unless an individual is wealthy, he is likely to be judgment-proof. Most insurance plans will not cover intentional acts. Corporations, on the other hand, are likely to be able to afford to pay damage actions for torts or harassment by their employees.

41. David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 24 (1994).

42. *Id.* at 20.

43. On the other hand, David Karp's description may ring true in the workplace context. Sexual harassment can be devastating to a woman's health and well-being.

Many employment lawyers handling harassment cases consider Rule 415 inapplicable to their cases. The National Employment Lawyer's Association describes the definition as "fairly limited," without referring to the rule's reference to the United States Code that includes the broader definition.⁴⁴ Even the President's lawyers were surprised to learn that their plans to air Paula Jones's sexual history were prevented by revised Rule 412, while similar sexual acts by him would likely be admissible under Rule 415.⁴⁵

In addition to its expansive definition of covered acts, Rule 415 multiplies the sources for such evidence.⁴⁶ There is no time limit on the uncharged conduct.⁴⁷ In the past, sexual character evidence in the form of prior bad acts was restricted to acts in the workplace and often

Individuals who harass others may well share some of the same characteristics that Karp is ascribing to rapists. *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) (making the analogy between problems of proof in rape cases and those that arise in sexual harassment cases).

44. Margaret A. Harris, *Defending and Presenting Motions In Limine*, NATIONAL EMPLOYMENT LAWYER'S ASSOCIATION, 1997 Eighth Annual Convention, Toronto, Ontario, Canada, June 25-28, 1997.

45. *See* David Stout, *Clinton Lawyer Retreats on Threat over Accuser's Sexual Past*, N.Y. TIMES, June 5, 1997, at A17. Ironically, President Clinton signed the law that created both rules. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §320935(a), 108 Stat. 1796, 2135-37 (1994). Paula Jones has proceeded with a pattern and practice theory in her case against President Clinton. Michael Isikoff & Stuart Taylor Jr., *The Paula Problem*, NEWSWEEK, Jan. 26, 1998, at 24. This has allowed her broad discovery into the President's alleged sexual liaisons that may have resulted in benefits to those who became his paramours. *Id.* These inquiries have resulted in recent allegations about an affair with White House intern, Monica Lewinsky. *See, e.g.,* Michael Isikoff & Evan Thomas, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 31. The alleged behavior, consensual sex, would not appear to be admissible under Rule 415 unless the plaintiff could show that it was accomplished under conditions of fear. Discovery of the alleged acts would be necessary to make that assessment. The judge in the Jones case, U.S. District Judge Susan Webber Wright, has precluded further discovery in the Lewinsky matter for other reasons, however. Stuart Taylor Jr., *Explaining the Legal Fine Print*, NEWSWEEK, Feb. 9, 1998, at 30.

46. *See infra* notes 47-51 and accompanying text.

47. The lack of time limitation was challenged by opponents of the rule in debate. Senator Joseph Biden posited a middle-aged defendant confronted with a witness who would testify about acts he may have done when he was fifteen years old. Biden noted, "to allow total, uncorroborated, unsubstantiated testimony about something that could have happened—anything—from the day before to 50 years before into a trial . . . absolutely violates every basic tenet of our system." 140 CONG. REC. S10277 (daily ed. Aug. 2, 1994) (statement of Sen. Biden). Since the rules became effective, one court has allowed the admission of evidence of prior child molestation under Rule 414 that arose over thirty years before the charged event. *United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997); *see also* *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997) (testimony covering events from sixteen to twenty years prior was admissible under Rule 414).

restricted to the time frame in which the plaintiff's complaints were made. Rule 415 does not require a workplace nexus for prior acts of sexual assault brought in as evidence.⁴⁸ Courts have looked outside the workplace to minimize the effect of sexual behavior in the workplace. In *Rabidue v. Osceola Refining Co.*,⁴⁹ the court dismissed complaints of sexual harassment that included vulgar and pornographic poster displays within the workplace. One poster showed a woman with a golf ball between her breasts and a man with a golf club standing over her and yelling "fore!" The court characterized the impact of such displays on the environment as "de minimis . . . when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."⁵⁰

Using this logic, a plaintiff could argue that the outside behavior of the alleged harasser is useful to determine whether his likely workplace behavior is socially acceptable. If 415 evidence is introduced, the defendant's prior behavior constitutes, by the terms of the rules, a criminal offense, and is presumptively socially unacceptable. This assists plaintiffs because a witness to sexual assault behavior outside the workplace can testify without fear of retaliation on the job. A plaintiff might garner evidence from the defendant's former place of employment or establish potential evidence of the defendant's behavior in social settings. For example, the plaintiff might offer testimony of waitresses from a local bar who say the defendant is a customer and regularly attempts to fondle the buttocks or breasts of waitresses while they are serving him. Domestic assault might also meet the federal definition. A supervisor's ex-wife might be willing to testify to sexual abuse during the marriage that caused her to seek a protection order.

The above examples appear to fall within Rule 415's definition of sexual assault. As a preliminary step, the plaintiff must then argue that such evidence is relevant to the claim. Rule 415 requires only that the evidence be relevant. Rule 401, governing relevance, is an extremely low threshold: it encompasses all "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵¹ Whether the defendant engaged in the alleged acts is certainly a fact of consequence, and his sexual character adds an

48. See, e.g., *Frank v. County of Hudson*, 924 F. Supp 620, 622 (D.N.J. 1996) (rejecting evidence of molestation of stepdaughter in sexual harassment case on grounds that it was inflammatory, but impliedly accepting that it fell within Rule 415).

49. 805 F.2d 611 (6th Cir. 1986).

50. *Id.* at 622.

51. FED. R. EVID. 401 (emphasis added).

inferential link in determining that fact. Because Rule 415 specifically allows a general propensity argument, the plaintiff might be able to show sufficiently similar circumstances to suggest that this is the kind of man who responds toward women in sexually inappropriate ways when in a position of relative power.⁵² The possibility of such explicit character arguments, formerly unheard in courts, demonstrates the potential significance of the change that Congress has wrought.

III. CONGRESS'S FORAY INTO CHARACTER EVIDENCE

The Federal Rules of Evidence are largely a codification of common law.⁵³ The rules are designed for general applicability, be the case criminal or civil, regardless of the substance of the litigation. Congress conferred the power to create these rules on the Supreme Court through the Rules Enabling Act,⁵⁴ under which process changes in the rules originate not in Congress but in the federal court system. The Act empowers the Court to create new rules or modify existing ones, as long as the change is procedural and not substantive. A rule making its way through the process will be scrutinized and reviewed many times: the governing body of the Federal Judicial Conference of the United States develops and proposes rule changes which must then be approved by the Supreme Court before being submitted to Congress. Typically, the rules are the result of study and recommendation from an Advisory Committee to the Judicial Conference. Proposed rules take effect six months after submission unless rejected or modified by Congress. Congress retains the power to propose and enact evidentiary rules on its own initiative, although since the 1975 passage of the Federal Rules of Evidence, it has rarely done so.

52. In the examples offered above, the relevance of the evidence from employees at a prior work site is probably easiest to establish. More problematic would be showing the relevance of the defendant's treatment of the waitresses by arguing, for example, that it is analogous to the defendant's behavior in a supervisory relationship. The most difficult argument, even under the pure propensity theory, would be the admissibility of domestic sexual abuse. Many courts are reluctant to analogize the relationship between intimates with the supervisory relationship in an employment setting. Nevertheless, depending on how the court reads the expansiveness of Rule 415's language, even this evidence might be admissible to support the contention that the defendant engaged in the acts in question. Both domestic violence and sexual harassment are misuses of power and exercises of domination.

53. See 21 WRIGHT & GRAHAM, *supra* note 11, § 5006.

54. 28 U.S.C. §§ 2071-77 (1994).

In developing Rules 413, 414, and 415, Congress took advantage of its power to propose evidentiary rules and bypass the Rules Enabling Act.⁵⁵ On September 13, 1994, Congress enacted Rules 413, 414, and 415 as a part of the Violent Crime Control and Law Enforcement Act of 1994.⁵⁶ The sponsors' goals were to increase the prosecution and conviction rate of people engaged in sexual misconduct and to make it easier for victims of such misconduct to bring civil actions to vindicate their rights. The new rules, developed without evaluation by the Advisory Committee, were soundly criticized by lawyers, the ABA, judges, and scholars.⁵⁷ Nevertheless, Congress passed the rules resoundingly after very little debate.⁵⁸

Rules 413 and 414 were touted by proponents as major tools for bringing rapists and child molesters to justice and criticized by opponents

55. The sexual character evidence rules, 412, 413, 414, and 415, are an example of the politicization of the Federal Rules of Evidence. These rules were not recommended by the Supreme Court, but were initiated in Congress in response to concerns about particular kinds of cases. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L.J.* 305 (1995). Political tinkering with rules is not limited to the rules of evidence. Ronald Levin notes that prominent civil procedure scholars have expressed misgivings about the role of special interests groups in inducing Congress to modify the rules of civil procedure. Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?*, 10 *ADMIN. L.J. AM. U.* 55, 61 (1996) (citing Paul D. Carrington, *The New Order and Judicial Rulemaking*, 75 *JUDICATURE* 161, 165 (1991)); see also Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 *BROOK. L. REV.* 761, 817-18 (1993); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. REV.* 795, 844-51 (1991).

56. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §320935(a), 108 Stat. 1796, 2135-37 (1994).

57. The Administrative Office of U.S. Courts solicited comments from lawyers, judges, scholars and interested organizations on Rules 413-415. Eighty-eight individuals opposed the rules and seven supported them. Twelve organizations opposed the rules, while three supported them. The primary reasons stated for opposition were that the rules were unfair (58 responding), had drafting problems (47 responding) and contained insufficient data on propensity (33 responding). The Judicial Conference of the United States reported to Congress that the overwhelming majority of judges, lawyers, law professors and legal organizations opposed the new rules. *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 52 (1995) [hereinafter *Report of Judicial Conference*]. The Conference also reported that, except for the representatives of the Department of Justice, the Advisory Committees on Criminal and Civil Rules and the Standing Committee unanimously opposed the new rules. *Id.* at 53.

58. See 140 Cong. Rec. H8968-01, H8990 (Aug. 21, 1994) (statement of Rep. Hughes) ("The rule changes in this bill are based on a Senate amendment that was offered on the floor of the Senate and had maybe 20 minutes of debate. It is procedurally and substantively flawed. There has been no debate on the potentially enormous impact it would have on civil or criminal cases.").

as imperiling the presumption of innocence. Rule 415, making sexual character evidence admissible in a civil case, appears to have been an afterthought.⁵⁹ There is little explicit mention of Rule 415 in the congressional debate. Nowhere in the legislative history is there any discussion of either how these rules would be used in civil cases, or what kinds of cases would benefit from this kind of evidence.⁶⁰ It apparently seemed fair to allow victims to use prior acts of sexual assault and molestation in damage suits against their rapists and child molesters.⁶¹

The implementation date for Rules 413, 414, and 415 was delayed to allow 150 days for the Judicial Conference of the United States to comment and propose alternative rules if necessary.⁶² The Judicial Conference submitted its report to Congress on February 9, 1995 opposing the rules⁶³ and suggesting that if Congress deemed such rules necessary, they should be redrafted to adopt a flexible approach that would give judges greater authority to exclude the evidence.⁶⁴ Congress ignored the report, and the rules as previously enacted became effective on July 9, 1995.

At the same time that Congress was considering rules to allow admission of sexual character evidence to prove action in conformity with

59. Wright and Graham refer to its inclusion as "cynical opportunism." The authors believe that these rules are merely the opening salvos of the Justice Department to get rid of the Rule 404 character bar. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5412B (referring to sections 5412 and 5412A).

60. Unlike amended Rule 412, Rules 413, 414, and 415 were not a part of the Violence Against Women Act, nor were they ever part of a "feminist agenda." Senator Biden, the primary sponsor of the Violence Against Women Act, argued strenuously against these rules, but in the end agreed to their inclusion over protest in order to get the bill passed. In debate over the rules, Senator Biden stated:

Now remember, I'm the guy who authored the Violence Against Women Act. It has been my crusade for the past 4 years to have violence against women taken seriously. . . . I, too, want to see more rapists and child abusers put behind bars. But not at the price of fairness. And not at the expense of what we know in our hearts to be right and just.

141 CONG. REC. S10966-07, S10967 (July 31, 1995) (statement of Sen. Biden). Senator Biden recognized that the rules would be a part of the bill. He said for the record: "Of everything in this crime bill, the only thing that I have a moral, intellectual, and practical aversion to is this last provision [Rules 413, 414, and 415]." 140 CONG. REC. S12250-02, S12261 (Aug. 22, 1994) (statement of Sen. Biden).

61. The inclusion of Rule 415 is described as "a fraudulent afterthought that someone in the Justice Department thought might appeal to feminists who might not otherwise support amendments to the criminal rules that would undermine recent changes to rule 412." 23 WRIGHT & GRAHAM, *supra* note 11, § 5412B (referring to sections 5412 and 5412A).

62. *Report of Judicial Conference*, *supra* note 57, at 51.

63. *Id.* at 54.

64. *Id.*

prior acts, Congress also considered changes in the federal rape-shield law (Rule 412) to ensure that sexual character evidence of a victim was inadmissible. Plaintiffs charging sexual misconduct were routinely asked about former rapes, childhood abuse, abortions, venereal disease, and even whether they had sex with animals or watched x-rated movies.⁶⁵ Their sexual fantasies were fodder for courtroom testimony and extensive discovery.⁶⁶ The defendant might argue to the fact finder that the plaintiff "invited his attention," or imply as subtext that she did not deserve protection. Essentially, defendants using such invasive tactics were urging judges and juries to indulge their bias that she "invited it." They looked to evidence of the plaintiff's sexual conduct in the hope that the fact finder would infer that because an alleged victim was sexually active she should not be believed, or because the alleged victim showed an interest in sexual matters, she probably consented to or welcomed the defendant's sexual approaches.⁶⁷ The original Rule 412 did nothing to protect plaintiffs in such situations. As a result, plaintiffs often dropped their suits to avoid these probing inquiries into their private lives.

When considering whether the Rule 412 shield should apply in civil actions, Congress had the benefit of the Advisory Committee's recommendations. Not only did the Advisory Committee address chronic problems with the criminal application of Rule 412, it also recommended the extension of the rule to civil actions.⁶⁸ Although this change was initially rejected by the Supreme Court, Congress ensured that the civil application of Rule 412 was included by adopting it in the Violent Crime Control and Law Enforcement Act of 1994.⁶⁹

65. Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases*, WALL ST. J., Sept. 19, 1994, at A1.

66. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual fantasies and dress were relevant to determining whether the conduct was welcome in a sexual harassment case).

67. In the worst cases, jurors appeared to believe that women who violated rigid norms about appropriate sexual conduct did not deserve to recover even if a violation could be proven. Estrich, *supra* note 43, at 846.

68. This may have been an effort to head off a congressional initiative. Congress was considering an amendment to the rule which would have extended it to civil actions, and which was more stringent than that proposed by the Advisory Committee. 23 WRIGHT & GRAHAM, *supra* note 11, § 5382 (Supp. 1997).

69. Pub. L. 103-322, 108 Stat. 1796, 2135-37 (1994). The Judicial Conference opposed the rule's extension to civil cases. When offered the Advisory Committee's recommended changes, the Supreme Court accepted the changes to the criminal aspect of the rule but rejected its civil application. In a letter to the chair of the Judicial Conference, Justice Rehnquist explained that several Justices believed the amendment would violate the Rules Enabling Act. See H.R. DOC. NO. 103-250, at V (1994). The Act precludes the Court from promulgating rules that modify substantive law. See Rules of Decision Act, 28 U.S.C. § 2072 (1994). The Justices were of the opinion that the

Even though the changes in Rules 412, 413, 414, and 415 were a part of the same piece of legislation,⁷⁰ they were designed to mollify

extension of the rule to civil applications would substantially alter a defense in workplace sexual harassment cases. H.R. DOC. NO. 103-250, *supra*. The federal judiciary has concurrent jurisdiction over court procedure because Congress delegated that authority through the Rules Enabling Act. See 28 U.S.C. § 2072. Though the Act precludes the Court from promulgating rules that modify substantive law, Congress is not limited in its ability to change substantive law. In order to avoid what was perceived to be a change in substantive law, the Supreme Court transmitted the rule to Congress as a rule for criminal sexual misconduct cases, not for civil cases. H.R. DOC. NO. 103-250, *supra*, at 1-3. In *Meritor Savings Bank*, the Supreme Court had said that an alleged victim's sexually provocative speech or dress was relevant to determine if alleged sexually harassing behavior was welcome. 477 U.S. at 68. The proposed rule arguably would make such evidence presumptively inadmissible since it constitutes evidence of "sexual predisposition." See *infra* notes 154-55 and accompanying text. The revised rule became law effective December 1, 1994, pursuant to the rule-making authority of the Supreme Court. 28 U.S.C. § 2072.

Congress was dissatisfied with the deletion. The Advisory Committee had described the extension of the rule to civil matters as "obvious," noting that a person's privacy interest does not disappear simply because the litigation involves a claim of damages or injunctive relief rather than a criminal prosecution. FED. R. EVID. 412(a) advisory committee's note. Ruling evidence of the victim's prior sexual history inadmissible would further the goal of Congress to crack down on sexual misconduct. See *id.* Congress proceeded to pass the civil component of the rule that had been deleted by the Supreme Court as a part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, 2135-37, to take effective December 1, 1994. As ultimately enacted, Rule 412 is identical to the version originally proposed by the Advisory Committee, though it was adopted through two separate rule-making processes. This calls into question whether Congress impliedly abrogated the defense of "welcomeness." In sexual harassment cases, to determine the probative value of evidence of dress and conversations in a workplace, courts have to interpret the current state of the law concerning "welcomeness." Much has been written to criticize the *Meritor* position that a plaintiff's dress, speech and lifestyle should be taken into consideration when evaluating whether workplace sexual harassment was "welcome." Christina A. Bull, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 UCLA L. REV. 117 (1993); Estrich, *supra* note 43; Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451 (1992); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997). Like evidence of consent in criminal prosecutions for rape, this dress, speech and lifestyle evidence shifts the focus from the offender's actions to the victim's behavior and character. One reading of Congress's action in the face of the Supreme Court's concern is that by legislative fiat "welcomeness" is no longer an issue in sexual harassment cases. For a detailed discussion of the possible changes that the adoption of amended Rule 412 may have had on the defense of welcomeness see Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 SW. U. L. REV. 363 (1996); see also 23 WRIGHT & GRAHAM, *supra* note 11, § 5385.1.

70. Pub. L. No. 103-322, 108 Stat. 1796, 2135-37.

very different political groups. The amendments to the rape-shield law (Rule 412) originated in the Violence Against Women Act, advocated by Senator Biden and feminist groups for three years before it finally passed as a part of the crime bill. The rules that allowed evidence of prior acts of sexual assault and child molestation (Rules 413 and 414) originated with Republican members of Congress as a part of a "get tough on crime" attitude manifested in the crime bill.⁷¹ However, there were some common interests. The proponents of Rule 412 and Rule 415 both recognized that the rules as they presently existed worked to the disadvantage of victims of sexual misconduct, and that what was needed was a change in the approach toward sexual character evidence.

IV. JUDICIAL RESPONSES TO ELIMINATION OF THE CHARACTER BAR

A basic axiom of evidence law is that the judge is charged with determining relevance. The judge also weighs probative value against prejudicial effect. Nowhere is the concern about unfair prejudice greater than when the admission of evidence risks luring the fact finder into arriving at a decision based on improper considerations.⁷² General propensity arguments are certain to draw objections that the evidence is more prejudicial than probative.⁷³ There are two schools of thought

71. For an excellent discussion of the legislative history of the Violence Against Women Act see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

72. The Supreme Court recently addressed this kind of prejudice in *Old Chief v. United States*, 117 S. Ct. 644 (1997). In a case in which a crime was predicated on conviction of a prior felony, the Court found that a district court abuses its discretion under Rule 403 when it fails to accept a defendant's offer to concede the prior felony conviction. *Id.* at 647. In *Old Chief*, the district court had allowed, over the defendant's objection, the admission of the name and nature of the prior conviction. *Id.* at 648. According to the Supreme Court, the admission of that evidence violated a fundamental tenet of evidence law that prohibits the use of evidence of a defendant's character to establish his probability of guilt. *Id.* at 650. Because the evidence was merely an element of the offense, and knowledge by the jury of the subject matter of the offense was not necessary, the Court found that the prosecution should have accepted the defendant's offer to stipulate. *Id.* at 655. The Court noted, however, that if the evidence has multiple utility, a finding of Rule 403 unfair prejudice may be inappropriate. *Id.*

73. Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

among commentators about whether Rule 403 applies.⁷⁴ A minority of commentators argue that Rules 413-415 require admission of relevant prior sexual misconduct irrespective of other rules.⁷⁵ This argument centers on the rule's use of the language "is admissible," which suggests that if evidence is relevant, it is admissible without regard for other rules of evidence, such as the hearsay bar or Rule 403.⁷⁶ The argument is supported by an inference of congressional intent drawn from Congress's failure to accept the Judicial Conference's recommendation that Congress address these issues through amendments to already existing rules.⁷⁷ Proponents of mandatory admissibility claim that in enacting these rules Congress resolved concerns about prejudice to the defendant. If a court adopts this mandatory approach to the rules, arguably a plaintiff need only

74. For a discussion of the issue of whether other rules of evidence limit Rule 415 see John W. McBee, *Federal Rule of Evidence 415: Making It Work*, 36 WASHBURN L.J. 89 (1996).

75. The Report of the Judicial Conference states that many commentators on the rules interpreted them to be mandatory. *Report of Judicial Conference*, *supra* note 57, at 53; see also James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1995); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753 (1995).

76. The federal rules use the language "is admissible" in only one other place in the body of the rules: Rule 402, which states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by . . . these rules" FED. R. EVID. 402. Rule 402 thus appears to mandate admission but for the listed exceptions. Rule 415 lists no exception, hence the argument that no exceptions apply. Although "is admissible" is stronger than the typical Federal Rules language of "may," the Federal Rules use the language "shall be admitted" when making explicit that Rule 403 does not apply. FED. R. EVID. 609(a)(2). For a discussion of these problems of language, see generally WRIGHT AND GRAHAM, *supra* note 11, §5411 (Supp. 1997).

77. The Judicial Conference's recommendations were offered as amendments to Rule 404 and 405. The report outlined the goals of the proposed amendments to:

- (1) expressly apply the other rules of evidence to evidence offered under the new rules;
- (2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;
- (3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination;
- (4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;
- (5) eliminate the special notice provisions of Rules 413-415 in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and
- (6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

Report of Judicial Conference, *supra* note 57, at 54.

meet the low threshold created by the relevance requirement for such evidence to be admitted.⁷⁸

Alternatively, critics of the mandatory admissibility position note that such a literal reading would open the door for evidence that is unreliable, inflammatory, confusing, or a waste of time.⁷⁹ They argue that a more realistic reading of the rule makes admission of prior sexual offenses presumptive rather than mandatory, and subject to such other rules of evidence as 403, hearsay, best evidence, and limitations on expert opinion. This position also finds support in the legislative history. In response to concerns about mandatory admissibility, the sponsors of this portion of the legislation assured congressional members that the new rules would be subject to Rule 403's balancing test.⁸⁰ However, they also said that: "The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects."⁸¹ Most courts encountering evidence offered under these rules have found Rule 403 applicable.⁸²

When asked about Rule 415, federal judges have responded that they will not admit such general propensity evidence, and that they would readily sustain Rule 403 objections.⁸³ Congress drafted Rule 415 in such

78. FED. R. EVID. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination . . . more probable or less probable than it would be without the evidence.).

79. See, e.g., Duane, *supra* note 75.

80. See 140 CONG. REC. S12990-01 (daily ed. Sept. 20, 1994); 140 CONG. REC. H8968-01, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect."); see also Karp, *supra* note 41, at 19 (this address to the Evidence section of the Association of American Law Schools on January 9, 1993 was incorporated in the Congressional Record as a part of the official legislative history).

81. 140 CONG. REC. at H8992 (statement of Rep. Molinari).

82. See, e.g., *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997) (finding the Rule 403 analysis of evidence offered under Rule 414 consistent with congressional intent); *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (finding Rule 403 applicable); *United States v. Guardia*, 955 F. Supp. 115, 117 (D.N.M. 1997) (Rule 403 balancing appropriate when considering Rule 413); *Cleveland v. KFC Nat'l Management Co.*, 948 F. Supp. 62, 66 (N.D. Ga. 1996) (Rule 403 applicable to Rule 415 evidence); *Frank v. County of Hudson*, 924 F. Supp. 620, 627 (D.N.J. 1996) (finding 415 evidence inadmissible under Rule 403); *United States v. Jackson*, CR. No. 95-388-FR, 1996 WL 444968 (D. Or. July 22, 1996) (finding prior acts of sexual misconduct not relevant).

83. As a faculty member of the Federal Judicial Education Center, I have had the opportunity to speak with federal magistrate and district court judges about how these rules apply in civil cases. Most are quite surprised at what the rules are designed to admit, and frankly state that they would find such evidence more prejudicial than

a way that arguably leaves a court very little discretion when determining admissibility.⁸⁴ Even if the rule does not limit judicial discretion entirely, at least it requires the court to be more circumscribed when finding prejudice. The sponsors of this legislation were aware that judges might resist. As Susan Molinari, the principal House sponsor, pointed out:

the practical efficacy of these rules will depend on faithful execution by judges of the will of Congress in adopting this critical reform. To implement the legislative intent, the courts must liberally construe these rules to provide the basis for a fully informed decision of sexual assault and child molestation cases, including assessment of the defendant's propensities and questions of probability in light of the defendant's past conduct.⁸⁵

Applying Rule 403 to sexual character evidence is complicated by two aspects of Rule 415: first, the probative value of such evidence might be inflated by Rule 415's allowance that evidence of this type is admissible for *any* relevant purpose; and second, one traditional source of unfair prejudice, that the evidence might be used to show general propensity, can no longer be considered in the balance.⁸⁶ Rule 415 is not affected by Rule 404's character bar: inferring present behavior from past bad acts is allowed under Rule 415. Therefore, if the objection to Rule 415 evidence is based on alleged unfairness caused by the possibility that the jury would find the defendant liable based on a general propensity

probative because the rules allow propensity evidence. Informal Survey of Federal Magistrate Judges, National Training Conference, in Denver, CO (July 1997); Discussion with 4th Circuit Judge at ALI-ABA workshop on evidence issues, in Charleston, S.C., (June, 1997).

84. The Justice Department, anticipating that judges would be reluctant to admit character evidence, stated, "Entrusting [federal] judges whose attitudes have been formed by the existing, restrictive rules to implement a fundamentally different approach under an essentially discretionary standard would . . . undermine the basic objective [of the new rule]." OFFICE OF LEGAL POLICY, *supra* note 15, at 760.

85. 140 CONG. REC. at H8992.

86. Rule 415 precludes arguing as unfairly prejudicial that the defendant is the kind of person who would do the act alleged. However, a legitimate Rule 403 argument would assert that the prior act evidence may encourage jurors to punish the accused for past conduct, or for other crimes they suspect the accused has committed, rather than focus on the currently alleged conduct to determine if the plaintiff has proven its case. Distinguishing this nuanced prejudice may be especially difficult when the prior act evidence concerns such inflammatory crimes as sexual assault or child molestation. See Richard O. Leinbert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1036 (1971).

theory, a Rule 403 objection should fail because Rule 415 specifically allows the jury to draw those conclusions.⁸⁷

The effect of broadening the basis for establishing probative value and narrowing the basis for finding unfair prejudice should weaken a Rule 403 objection. Yet, other than stranger rape or child molestation cases, in every reported case where the proponent has offered evidence that relies on the broad definition of sexual assault, the courts have sustained 403 objections.⁸⁸ Similarly, although the rule specifically permits "bad character" evidence, judges resist, and most do not allow sexual character evidence offered for general propensity purposes in civil cases.⁸⁹ Rule 415 is meaningless if it cannot be used to allow admission of character evidence.⁹⁰

In *Frank v. County of Hudson*,⁹¹ a sexual harassment action brought by employees of the Sheriff's Office against the County of Hudson, the Sheriff's Office and several officials, the defendants sought a protection order to preclude the plaintiffs from using the statement of a defendant supervisor's stepdaughter that he had sexually abused her for nearly ten years.⁹² The plaintiffs, whose allegations against this supervisor

87. See 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 584 (1994).

88. See, e.g., *United States v. Guardia*, 955 F. Supp. 115, 117 (D.N.M. 1997) (Rule 403 balancing appropriate when considering Rule 413); *Cleveland v. KFC Nat'l Management Co.*, 948 F. Supp. 62, 66 (N.D. Ga. 1996) (Rule 403 applicable to Rule 415 evidence); *Frank v. County of Hudson*, 924 F. Supp. 620, 627 (D.N.J. 1996) (finding 415 evidence inadmissible under Rule 403); *United States v. Jackson*, CR. No. 95-388-FR, 1996 WL 444968 (D. Or. July 22, 1996) (finding prior acts of sexual misconduct not relevant). By contrast, when the cases are based on allegations of rape or child molestation and the prior act evidence is rape or child molestation, the courts have admitted the evidence. See, e.g., *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997) (similar sexual acts with children some 16-20 years prior admissible to prove present molestation); *United States v. Akram*, No. 97 CR 78, 1997 WL 392220 (N.D. Ill. July 8, 1997) (other acts of sexual assault during same time period admissible to prove sexual assault on two minors).

89. See, e.g., *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997) (in a prosecution for criminal sexual assault, evidence indicating defendant had previously assaulted young girls not admissible because general propensity evidence is unfairly prejudicial); *Guardia*, 955 F. Supp. at 115 (testimony of other witnesses alleging inappropriate acts during a gynecological exam not admissible under Rule 403); *Frank*, 924 F. Supp. at 620 (discussed *infra* notes 91-97 and accompanying text); *Shea v. Galaxie Lumber & Constr. Co.*, No. 94 C 906, 1996 U.S. Dist. LEXIS 2904 (N.D. Ill. Mar. 12, 1996) (Rule 403 requires exclusion of sexual character evidence).

90. If one could articulate a non-character justification for the prior acts evidence, then presumably the evidence would be admissible under Rule 404(b). This would render Rule 415 superfluous.

91. 924 F. Supp. 620 (1996).

92. *Id.* at 622.

included claims that he forced them to view him masturbating, and that he sexually touched the plaintiffs' buttocks, made gratuitous sexual comments, and intimidated them through the use of a shotgun,⁹³ offered a number of theories of relevance for the stepdaughter's statement. These included the general propensity of the supervisor to engage in sexual assaults, the supervisor's motive and intent, and his supervisors' prior knowledge of his conduct.⁹⁴ The court assigned a low degree of probative value to these theories⁹⁵ and stated there was a great risk of unfair prejudice.⁹⁶ The prejudice that the court identified was the emotional response that child sexual abuse is likely to elicit in a trier of fact. In issuing the protective order, the court said, "And the potential for unfair prejudice if the evidence were admitted at trial is great. The purpose of the evidence rules' general prohibition against propensity evidence is to address the danger that a jury might convict the defendant not for the offense charged but for the extrinsic offense presented."⁹⁷

This court's reasoning is inconsistent with the mandates of Rule 415. Instead of crediting the use of character evidence in its analysis of probative value, the court discounts those theories. It also heightens Rule 403 concerns by focusing on the prejudicial effect of the prior acts evidence.⁹⁸ The court's analysis suggests that evidence of prior sexual assault must be relevant on some other ground than character. This is the underlying reasoning for Rule 404(b), and would add little, if anything, to that traditional analysis.⁹⁹ The court's interpretation effectively eviscerates Rule 415. However, the legislative history of Rules 413 and 414 indicates that Congress decided that the risks of generally allowing sexual character evidence were overshadowed by the need to crack down on crimes of sexual abuse. Congress adopted the rule despite being

93. *Id.*

94. *Id.* at 625-26.

95. *Id.* at 626.

96. 924 F. Supp. at 626-27.

97. *Id.* at 627.

98. There are other kinds of prejudice beyond "propensity prejudice." Here the court appears to be giving weight to what might be called "nullification prejudice." Nullification prejudice occurs when the jury is so swayed by the evidence of the defendant's bad conduct that it ceases to care whether he committed the act in question. With the passage of Rule 415, courts will be asked to make a fine distinction when assessing prejudice: it is prejudice when the jury would likely find liability based on the prior acts despite the lack of evidence on the present charge. It is not prejudice when the jury uses the prior acts to assess whether the person actually did the present act.

99. *See supra* note 26.

warned by the Judicial Conference that this was an ill-advised and fundamental alteration of traditional principles and standards.¹⁰⁰

Another example of a court negating the intent of Rule 415 is found in *United States v. Guardia*,¹⁰¹ a criminal case against a physician charged with criminal sexual penetration and simple battery arising from gynecological examinations of two patients. The government sought to introduce the testimony of four other women who alleged similar acts of inappropriate touching during their gynecological examinations.¹⁰² The defense maintained that no such sexual activity occurred. The prosecution argued that such evidence was admissible under Rule 413 to show that the defendant has "an on-going disposition to commit sexual assaults against his female patients."¹⁰³ The court granted the defendant's motion in limine stating:

[T]he Court believes it is more appropriate to interpret Rule 413, like the other Rules of Evidence, to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. These goals would not be served by allowing six rather than two witnesses to testify as to how they believe Defendant sexually assaulted them and, more importantly, subjecting the jury to the expert testimony necessary for it to determine the legal significance of such testimony by each 413 witness.¹⁰⁴

The court's reasoning appears to undercut the purpose of Rule 413 (the criminal analogue of Rule 415). Here the prosecution was offering prior acts of the defendant substantially similar to the acts alleged. The defense contended that inappropriate acts never occurred.¹⁰⁵ The court

100. The language the court uses in *Frank* reveals the concern for general propensity. A better tack for the court to have taken without violating the intent of Rule 415 would have been to deny the relevance of the evidence because it was not sufficiently similar to the alleged acts to fall within Rule 415. If Rule 415 is narrowed in the ways that I suggest, see *infra* part V.B.1, this case would probably reach the same result.

101. 955 F. Supp. 115 (D.N.M. 1997).

102. *Id.* at 116.

103. *Id.* at 119 (quoting the Government's Response to Defendant's Motion in Limine).

104. *Id.* at 119-120.

105. The "doctrine of chances" undergirds this use of general propensity evidence. See Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances: Relying on the Concept of Relative Frequency to Admit Uncharged Misconduct Evidence*, 7 CRIM. JUST. 16 (1992) (discussing and clarifying the doctrine of chances).

did not specifically argue that it would not admit character evidence because it offends the character bar but rather alluded to the potential for confusion and delay.¹⁰⁶ Such an argument might have more force if the evidence were dissimilar, but here the evidence was of the same sort as that alleged in the criminal complaint. Given Rule 413's broad mandate of admissibility, as well as the similarity of the prior acts, their proximity in time, and repetitive nature, the required showing under Rule 403—that the unfair prejudice outweigh the probative value—was not satisfied. The court's concern about confusion appeared to be grounded in the fear that the trier of fact might use the other acts to determine whether the defendant engaged in the present act, in other words, to show general propensity under Rule 413.¹⁰⁷

Finally, in *Cleveland v. KFC National Management Co.*,¹⁰⁸ a sexual harassment case, the defendant moved that the plaintiff be precluded from admitting any evidence of prior sexual misconduct of her former manager, an employee of KFC.¹⁰⁹ The defendant argued that the evidence was inadmissible under Rule 415, and that even if it were admissible, its prejudicial effect substantially outweighed its probative value.¹¹⁰ After finding that Rule 415 did apply to these facts and that it was admissible against the company through respondeat superior,¹¹¹

106. Because the case turned on whether the defendant's acts were medically appropriate, expert opinion was necessary. The court noted that for each witness further expert testimony would be required. The court noted that the witnesses would interject "confusingly similar, but potentially distinguishable, legal issues into the trial," and said, "This would essentially create a trial within a trial with regard to allegations by non-prosecuting witnesses, related to actions for which Defendant is not charged." *Guardia*, 955 F. Supp. at 118.

107. This case could have been decided by finding the evidence of prior acts to be offered for a non-character purpose, that is, to show that the defendant *intended* to engage in sexual assault in his examinations. This suggests an irony in the application of Rule 403. Prejudice depends on the badness of the act, not whether it is character or non-character evidence. Thus, the only thing that distinguishes evidence prohibited by Rule 404 from evidence permitted (subject to Rule 403) by Rule 404 is the low probative value of the former. The congressional judgment underlying Rules 413-415 must have been that despite the relatively low probative value of sexual assault character evidence (compared with sexual assault non-character evidence), this type of character evidence has sufficient probative value to make it potentially admissible. If implementing the congressional intent requires some relaxation of, or presumption against, Rule 403 concerns with regard to character evidence in sexual assault cases, it would seem appropriate to take the same approach to non-character evidence in such cases. It would seem anomalous to have a more rigorous Rule 403 test for non-character (i.e., more probative) sexual assault evidence than for character sexual assault evidence.

108. 948 F. Supp. 62 (N.D. Ga. 1996).

109. *Id.* at 62-63.

110. *Id.* at 64.

111. *Id.* at 65.

the court turned to the Rule 403 analysis. The evidence the plaintiff sought to introduce was not described in specific detail but was characterized as "inflammatory."¹¹² The court instructed the plaintiff that if she wished to admit the evidence of the agent's misconduct, the evidence "must be both probative in that it proves corporate knowledge of similar misconduct and it must corroborate plaintiff's story; otherwise, the prejudicial effect on the jury is not substantially outweighed."¹¹³ Evidence of "notice" to the employer would be admissible under Rule 404(b). Corroboration, on the other hand, would not be admissible unless under Rule 415 since it would be character evidence. By using the conjunction "and" in its instruction to the parties regarding the effect of Rule 403, the court required the evidence to be used for non-propensity purposes, thereby gutting Rule 415.

In each of these cases, the court's interpretation of how 403 balancing affects Rules 413 and 415 is inconsistent with the plain meaning of the rule. Congress can enact rules of evidence that deprive judges of discretionary authority. The fact that such rules can result in what otherwise might be "unfair prejudice" does not invalidate the rule. In *Green v. Bock Laundry Machine*,¹¹⁴ for example, an injured worker brought a products liability action against a manufacturer after the worker's arm was severed while he was working at a car wash. The plaintiff was employed while on work release from the county prison. The defendant cross-examined the plaintiff about prior felony convictions for burglary under then-rule 609(a)(1), which allowed impeachment with prior convictions without any balancing of unfair prejudice against probative value. After a judgment for the defendant, the plaintiff appealed. The plaintiff argued that Rule 609 should be subject to the Rule 403 balancing test. He cited as unfair prejudice the fact that the jury might use the burglary convictions to decide he was a "bad man," not worthy of compensation, rather than to assess veracity. The Court recognized that such mandatory admission might produce some unjust results, but held that mandating admission was the plain meaning of the rule.¹¹⁵ The Advisory Committee responded to the concerns raised in *Green* by amending Rule 609 to ensure that there would be traditional Rule 403 balancing when determining admissibility of prior convictions for impeachment purposes.¹¹⁶

112. *Id.* at 66.

113. 948 F. Supp. at 66.

114. 490 U.S. 504 (1989).

115. *Id.* at 527.

116. Rule 609(a) as amended now reads, "For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, *subject to Rule 403*, if the crime was punishable

When judicial decisions applying Rule 415¹¹⁷ find their way to the Supreme Court, the Court could find that the plain meaning of Rule 415 precludes the application of any other rule, and thus that Rule 403 balancing is inappropriate.¹¹⁸ It is not likely the Court will go that far. It could find that Rule 403 balancing is allowed when applying Rule 415 but that general propensity concerns are, by the terms of the rule, not necessarily unfairly prejudicial. Any finding that Rule 403 prevents admission must be based on more limited concerns of waste of time or confusion.¹¹⁹ This would have the probable effect of forcing judges to admit the evidence despite their reservations about the fairness of using sexual character evidence.¹²⁰ Any change in that outcome would have to come from Congress.

by death or imprisonment in excess of one year” FED. R. EVID. 609(a) (emphasis added).

117. I am focusing on the possible challenge to the civil application of these rules. Rules 413 and 414 might raise significant constitutional problems in their criminal application. See *infra* notes 124-25, 132 and accompanying text. Those constitutional concerns do not arise in a civil case.

118. This would be consistent with Justice Scalia’s opinion in *Green*, in which he eschews looking at legislative history; i.e., committee reports and statements of a handful of legislators, but instead looks to the plain language of the rule. *Green*, 490 U.S. at 529-39; see also *supra* notes 74-76 and accompanying text. Since 1995, the Supreme Court has shifted away from a pure textualist approach to the interpretation of the Federal Rules. See Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 331 (1995).

119. Even arguments of staleness may be precluded from Rule 403 consideration. See *United States v. Meachum*, 115 F.3d 1488, 1492 (10th Cir. 1997) (evidence of acts of molestation of step daughters thirty years prior admissible under Rule 414 in prosecution for transporting a minor across state lines with intent to engage in sexual activity).

120. The dissenters in *Green* argued that Rule 609’s drafters intended to ignore these reservations, but remained concerned about the admission of evidence that has the “danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.” *Green*, 490 U.S. at 532 (Blackmun, J., dissenting).

V. REFINING THE PROPENSITY RULE

A. Policy Considerations

1. THE CRIMINAL ANALOGY

Normally, evidence that is probative is admissible, unless there is a policy reason to exclude it.¹²¹ One such reason has been the concern about general propensity evidence, but it has never been an absolute bar. Evidence of prior acts has been increasingly accepted under the rubric of Rule 404(b),¹²² but courts have required a showing (even if fictional) that such evidence has not been offered for pure propensity purposes.¹²³ Allowing explicit character arguments elicits vigorous criticism from scholars and lawyers. The majority of this criticism focuses on the use of character evidence in criminal cases; it does not address the use of sexual character evidence in civil cases. Nevertheless, such concerns should not be taken lightly when refining something as formidable as the character bar.

Character evidence presents several practical problems in the criminal context that carry less force in civil proceedings. First, as critics have noted, routinely admitting evidence of prior misconduct similar to charged conduct exacerbates the law-enforcement tendency to "round up the usual suspects."¹²⁴ A defendant might have become a suspect merely because of his prior acts, not necessarily because he matched a

121. Rule 402 states:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402.

122. See *supra* note 26.

123. Courts often admit character evidence asserting that it does not offend the general propensity bar when, in fact, its relevance is purely character-based. See Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747 (1996); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

124. See Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997). People with histories of child molestation or sexual assault are likely to be members of photo arrays or lineups from which victims are asked to choose. There has been a great deal of social science literature to suggest that these identification procedures can be quite suggestive. See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979); A. DANIEL YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* (1979); Hadyn D. Ellis, *Practical Aspects of Face Memory*, in *EYEWITNESS TESTIMONY* 12 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

description given by the victim. To then allow evidence of his prior acts of misconduct to indicate that he was more likely to have committed the present crime compounds the potential for convicting a wrongly identified man.¹²⁵ The plaintiff in a sexual misconduct case knows and can identify the defendant, so the risk of misidentification reinforced by admission of prior misconduct, present in criminal cases, is not a concern in the civil setting.¹²⁶ Second, such evidence adds complexity to trials.¹²⁷ However, in a civil case, unlike its criminal counterpart, the defendant has much more power to structure his defense to limit the relevance of certain evidence.

On the other hand, the use of character evidence in a civil context still prompts several concerns. For example, some of the protections built into the criminal process are not present in a civil case. Consider the ways a victim of a crime, drawn into a criminal prosecution, might differ from a plaintiff seeking personal redress. Rule 412 is to be invoked by a person characterized as an "alleged victim of sexual misconduct."¹²⁸ The victim of a crime will have already been vindicated by an indictment, whereas the plaintiff in a civil action must self-certify her status as the "alleged victim." The defendant in a criminal case may have his defense paid for by the state, and is entitled to constitutional protections. Neither

125. Given police procedures, this is likely to have a disparate impact on poor men of color. *Baker, supra* note 124, at 593; *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495 (1988). Critics note with relief that because these are federal rules, there will be few instances in which they will be applied, since criminal law is uniquely a state endeavor. There are very few federal prosecutions for sexual assault and child molestation. Harvey Berkman, *Crime Bill Sex Rule Stirs Evidence Debate*, NAT'L L.J., Sept. 5, 1994, at A-16. But these prosecutions are likely to disproportionately affect Native Americans and persons on federal enclaves since they are subject to federal criminal jurisdiction. *Id.*

126. Bryden and Park make the point that in acquaintance-rape cases, a criminal action roughly analogous to claims of sexual harassment, the cumulative uncharged misconduct evidence is "usually extraordinarily credible." Bryden & Park, *supra* note 15, at 577. They note that credibility derives from the fact that the risk of an honestly mistaken accusation is negligible, and the danger of deliberately false accusations is reduced by the intrusiveness of the investigation and the prospect that the defense will attack the complainant. *Id.* Roger Park has also noted the absence of this problem with respect to Rules 413-415 when dealing with the consent defense because there is no dispute that sexual contact has occurred. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 273 (1995).

127. Typically, criminal defendants do not have the resources to defend the charged conduct, much less the mini-trials on prior misconduct that Rules 413 and 414 would require. Such mini-trials increase the time and cost of trials, and may result in confusion within the jury as a court goes far afield of the events that are the subject of the present prosecution.

128. FED. R. EVID. 412.

of those benefits are available to the defendant in a civil case. However, these concerns might be overrated in the civil context. Civil plaintiffs, though not screened for credibility through the indictment process, are subject to summary judgment motions and Rule 11 sanctions. The mere filing of a lawsuit is costly and difficult. Those factors alone might act as an equivalent to certification of "alleged victim" status in a criminal case. The defendants in civil cases might not have access to a paid-for defense, but they are far less likely to be indigent. Indeed, such civil actions are unlikely to be brought against penniless defendants.¹²⁹

Critics argue that the admission of sexual character evidence violates fundamental notions of due process¹³⁰ and the presumption of innocence.¹³¹ In the criminal setting, there is some case support for such criticism.¹³² In a civil setting, this criticism carries less weight because the concerns that underlie an accusatorial system of justice are

129. Typically, in a criminal case, the prosecution has the bulk of the resources to move the case forward, and the defendant is often the party of lesser means. The reverse is usually true in civil actions.

130. See Duane, *supra* note 75; Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 82, 89; Natali & Stigall, *supra* note 18; Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 67 (1995). Furthermore, critics argue that the admission and use of such evidence requires an irrational and arbitrary inference when offered to prove that the defendant committed the act charged. Edward Imwinkelried suggests that since the rule targets recidivists, it may require heightened scrutiny. Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125 (1993).

131. See *Taylor v. Kentucky*, 436 U.S. 478 (1978); Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual Offense Evidence in Washington*, 70 WASH. L. REV. 883 (1995). Research has indicated that admission of this kind of evidence significantly increases the chance of a finding of guilt and undermines the presumption of innocence. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 174 (1966). Ironically, we tolerate the use of prior-act evidence through the introduction of past convictions to impeach, even though common wisdom and social science literature suggest that juries do not follow limiting instructions. See, e.g., Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 Crim. L. Bull. 504, 525 (1991); A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM L.Q. 88, 90 (1972); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37 (1985).

132. See *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom.*, *Duncan v. Henry*, 513 U.S. 364 (1995); *United States v. Has No Horse*, 11 F.3d 104 (8th Cir. 1993); *Government of Virgin Islands v. Archibald*, 987 F.2d 180 (3d Cir. 1993); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948).

not present.¹³³ There is no presumption of innocence except insofar as the plaintiff bears the burden of proof. The defendants in civil cases do not face the threat of incarceration, or other deprivations of liberty or the stigma attached to a criminal prosecution. They are not prosecuted by the state. Civil actions provide an opportunity for vindication of private rights. It might be inappropriate to allow the state to lessen its burden of proof in order to fight crime. However, it is another matter when the victim herself seeks to vindicate her rights. Nevertheless, there is an underlying perception of unfairness in civil court. Sexual character evidence carries with it a moral condemnation, and one should be wary of rules that make moral condemnation easier. Arguing that the defendant is a bad man and therefore should be found liable in this case might significantly increase the probability that the plaintiff will prevail, but not without some cost to the integrity of the judicial system.

2. THE NEED FOR CHARACTER EVIDENCE IN CIVIL CASES

There are compelling reasons to admit sexual character evidence. Critics of character evidence in general suggest that juries tend to overvalue it, thereby inappropriately shifting the balance against the defendant. However, plaintiffs in sexual misconduct cases face the opposite problem: jurors tend not to believe the plaintiff's story unless they have evidence the defendant has behaved that way before.¹³⁴ If the plaintiff is prohibited from introducing character evidence, juries make the "Mr. Clean" assumption and are less willing to credit her claims.¹³⁵

133. See, e.g., 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 55 (3d ed. 1983).

134. See Roger L. Hutchinson et al., *Students' Perceptions of Male Sexually Aggressive Behavior as a Function of Educational Level and Gender*, 30 SEX ROLES 407, 410 (1994); Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38(4) J. SOC. ISSUES 5, 6 (1982); see also Karen Andrews, *The Admissibility of Other-Crimes Evidence in Acquaintance-Rape Prosecutions*, 17 S. ILL. U. L.J. 341 (1993); Sara Sun Beale, *Prior Similar Acts in Prosecution for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307 (1993).

135. See J. Michael Egbert, Jr., et al., *The Effect of Litigant Social Desirability on Judgements Regarding a Sexual Harassment Case*, 7 J. SOC. BEHAV. & PERSONALITY 569, 577 (1992) (finding that while social desirability of both litigants affects verdict, defendant social desirability alone significantly affected subjects' impression of guilt). Roger Park discusses the use of character evidence using the regret matrix. The regret matrix is based on the idea that jurors will seek to minimize their sense of regret over reaching an incorrect decision. Jurors will anticipate less regret if they wrongfully convict a person they believe has committed other crimes. Park, *supra* note 126, at 274. Park notes however, that the regret matrix needs to be re-set in the case of acquaintance rape.

If in acquaintance rape cases jurors are likely to act on conceivable doubts that are not really reasonable doubts, then re-setting their regret levels can give

Without Rule 415, plaintiffs can be hamstrung by being prohibited from introducing evidence to counter jury bias.¹³⁶

Congress singled out sexual assault and child molestation cases because, unlike other crimes, they often turn on difficult credibility determinations.¹³⁷ The need for victim corroboration particularly arises in sexual misconduct cases when the parties have known one another.¹³⁸ Unlike other offenses, sexual misconduct cases raise the question of whether the victim consented or welcomed the behavior.¹³⁹ Sexual

them a more appropriate attitude toward reasonable doubt. There is good evidence that jurors are prejudiced against the prosecution in consent defense cases. The admission of evidence about the defendant's prior sexual assaults may therefore push jurors closer to the right standard of proof.

Id. at 274-75 (citations omitted).

136. Prior to Rule 415, evidence that the alleged perpetrator had engaged in other acts of sexual harassment was often deemed inadmissible as in violation of Rule 404's character bar. Susan Estrich points out that courts rely on the absence of harassment complaints to determine if harassment occurred, yet at the same time prevent plaintiffs' attorneys from questioning female co-workers about such harassment. She cites the lower court decision in *Henson v. City of Dundee*, 682 F.2d 897, 899 (11th Cir. 1982), in which the trial judge held against a plaintiff, relying on the fact that the boss had never propositioned any other workers, after sustaining a relevance objection when the plaintiff's counsel sought to inquire on that point. Estrich, *supra* note 43, at 848 n.143.

137. Representative Molinari described adult-victim sexual assault cases as "distinctive," saying:

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over this [sic] wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

140 CONG. REC. H8968-01, H8991-92 (daily ed. Aug. 21, 1994).

138. In the past, rape law explicitly required corroboration. That requirement came under attack by feminists and the necessity of proving corroboration in the prosecution's case in chief has formally disappeared. However, many argue that it now exists in a more subtle form. Juries in rape cases continue to informally require corroboration even when it is no longer a legal requirement. Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison with Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1300 (1982). Susan Estrich points out that even though American jurisdictions have abandoned formal rules requiring corroboration, evidence that corroborates the victim's story is still necessary to prove rape or sexual harassment. Estrich, *supra* note 43, at 850.

139. By contrast, if the complainant had been the victim of robbery, the jury would not be predisposed to disbelieve her. Robbery also may occur in a clandestine fashion such that corroborating evidence would be useful to resolve credibility issues. Treating sex offenses differently from other offenses is justified by at least two distinctions: first, jurors are predisposed to disbelieve complainants when encountering

character evidence in such cases provides corroboration for the complainant.¹⁴⁰ The need for corroboration springs from the belief that if there is a swearing contest between a man and a woman about whether there was sexual misconduct occurred, the man will be believed.¹⁴¹

The need for corroboration does not arise only in sexual assault cases. Sexual harassment cases also frequently turn on an assessment of whether the plaintiff welcomed the behavior.¹⁴² Moreover, the plaintiff is making a charge against a more powerful party: she is frequently a subordinate bringing a claim against a superior.¹⁴³ The alleged harasser often comes to the lawsuit with the "Mr. Clean" presumption plus the added respectability of a supervisory or managerial position, increasing his apparent social desirability and credibility.¹⁴⁴ The result is a jury

claims of sexual misconduct than other types of cases, *see* HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 117-19 (1980); Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985); and second, the injury resulting from sex offenses is more serious than that associated with theft. Beale, *supra* note 134, at 317.

140. Sara Sun Beale notes the structural difficulty of proving sexual offenses, which virtually all occur in private and feature little, if any, corroborative physical evidence. The cases come down to the complainant's word versus the word of the defendant and turn on what evidence there may be to resolve the swearing contest. Beale, *supra* note 134, at 317.

141. In the classic jury study by Harry Kalven, Jr. and Hans Zeisel, the authors found that men and women adhered to such myths as "only bad girls get raped;" women provoke rape by their appearance and behavior; women enjoy violent sex; women charge rape out of vindictiveness; and rapists are abnormal men without access to consensual sex. *See* KALVEN & ZEISEL, *supra* note 131, at 249-51. Such beliefs have been confirmed in modern studies as well. *See, e.g.,* GARY LAFREE, RAPE AND CRIMINAL JUSTICE 203 (1989) (describing impact of victim behavior on juror assessment of rape). Similar studies of jurors' beliefs in sexual harassment cases do not appear to be available. Nevertheless, there are substantial analogies between nonstranger rape cases and sexual harassment that suggest that similar juror attitudes exist.

142. The Clarence Thomas confirmation hearings provide perhaps the most noted example of the need for corroboration in sexual harassment claims. Throughout Anita Hill's testimony, commentators implied that if this had happened with her, it must have happened with many others. The absence of the others' testimony cast doubt on her credibility. MAYER & ABRAMSON, *supra* note 2, at 321-50.

143. Social science research reinforces this idea. Sexual liaisons with coworkers have been found to enhance a man's status in the organization and degrade a woman's status. Robert E. Quinn, *Coping with Cupid: The Formation, Impact and Management of Romantic Relationships in Organizations*, 22 ADMIN. SCI. Q. 30 (1977).

144. Studies also indicate that the social desirability of the litigant can have a substantial effect on the outcome of the lawsuit. According to social science research, social desirability is likely to have impact on the fact finder's assessment of credibility and might make the difference between finding for the plaintiff and finding for the defendant. *See* Egbert et al., *supra* note 135, at 569.

predisposed to favor the defendant.¹⁴⁵ If evidence of prior acts of sexual assault is admitted, it will likely cause the jury to rethink its assessment of the individual.¹⁴⁶

In sexual harassment cases, the third or fourth woman to experience the harassment is often the one who brings the case,¹⁴⁷ and it takes those other women's testimony to make the plaintiff's story believable.¹⁴⁸ If jurors learn the alleged perpetrator engaged in similar unwelcome acts in the past, they still might not believe the plaintiff; they may even find problems with the stories of other alleged victims.¹⁴⁹ But

145. This predisposition to favor the alleged perpetrator results in various strategies for discrediting the alleged victim. Social science research suggests that victims of sexual offenses face a double bind: jurors tend to believe that a man would not assault an unattractive victim. Yet, jurors tend to view the attractive victim as having played an active role in her own assault. Marsha B. Jacobson & Paula M. Popovich, *Victim Attractiveness and Perceptions of Responsibility in an Ambiguous Rape Case*, 8 PSYCHOL. WOMEN Q. 100, 103 (1983).

146. See Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213 (1991). Recent cases demonstrate the powerful effect of similar-acts evidence. William Kennedy Smith was acquitted in the rape case brought against him in 1991. The rules of evidence precluded admission of three other women's testimony alleging similar experiences. Therefore the jury could not take these into consideration when evaluating his claim that the sex was consensual. See generally Beale, *supra* note 134, at 308; Timothy Clifford, *Smith's Case Promises to Be a Landmark*, NEWSDAY, Oct. 29, 1991, at 6. In contrast, Marv Albert, NBC sportscaster, pleaded guilty to a charge of sexual assault only after the prosecution offered evidence from another woman alleging that Albert had done similar acts to her. Despite evidence undermining the credibility of his primary accuser, the corroboration of the other woman changed the public's opinion of that case and resulted in his willingness to accept a plea bargain. See generally Matthew Cooper, *Marv Goes to the Showers*, NEWSWEEK, Oct. 6, 1997, at 40; Brooke A. Masters & Mandy Stadtmiller, *Surprise Witness Says Albert Bit Her, Too; Hotel Employee Tells of Two Encounters Resembling Incident Alleged in Sex Assault Case*, WASH. POST, Sept. 25, 1997, at D1.

147. Estrich, *supra* note 43, at 849. The existence of more than one accuser may have fueled the prosecution of Sergeant Major Gene McKinney. One accuser in the case explained why she tolerated his unwanted advances for a long time. She did not make the harassment claim until another woman came forward. *Jury Hears Tape in Trial on Army Sex Misconduct*, ST. LOUIS POST DISPATCH, Feb. 11, 1998, at A3.

148. See, e.g., *Horn v. Duke Homes*, 755 F.2d 599, 602 (7th Cir. 1985) (three other women employees came forward to testify that the same supervisor had repeatedly harassed them); *Priest v. Rotary*, 634 F. Supp. 571, 574-76 (N.D. Cal. 1986) (plaintiff managed, with the help of other employees, to establish a pattern of sexual harassment by restaurant owner); Estrich, *supra* note 43, at 836 (noting that generally only when sexual harassment is endemic to the workplace and other women come forward can plaintiffs succeed in establishing that the stated reason for their firing was a pretext).

149. Unlike milder forms of sexual interaction, there are unambiguous social norms against sexual bribery, sexual coercion, and sexual assault. Jasmine Tata, *The Structure and Phenomenon of Sexual Harassment: Impact of Category of Sexually Harassing Behavior, Gender, and Hierarchical Level*, 23 J. APPLIED SOC. PSYCHOL. 199,

if no reason exists to suggest collusion among the accusers, such corroborating evidence has a synergistic effect.¹⁵⁰ The fact that such acts all occurred is independent evidence that confirms the plaintiff's complaint.

It is often asked in high profile sexual misconduct cases: if what she says is true, where are all the other women?¹⁵¹ The common wisdom is that if a person has harassed someone on the job, then he has done it frequently. Despite juries' biases that the single report of one victim is insufficient, prior to Rule 415 a plaintiff in a sexual harassment case could not present evidence of other acts by the defendant because of the bar on character evidence. Rule 415 removes the character-evidence bar for sexual assault cases because such a barrier does not make sense in the context of sexual misconduct. The rule opens the door to evidence that can counterbalance biased responses about victim credibility, and thereby even out the jury's credibility assessment.

It is not a new idea to use the rules of evidence to remedy bias in the fact finding process.¹⁵² Rule 412 bars the admission of evidence of an

208 (1993).

150. Wigmore established the term "doctrine of chances" to describe how prior similar acts are evidence of the improbability that the defendant has been falsely or mistakenly accused of a crime. IMWINKELRIED, *supra* note 28, § 4.01. The drafters of the law relied upon the doctrine of chances and offered an example:

"[For example, suppose] the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant and even nonarson fires at premises owned by the defendant. In these cases, the courts invoke the doctrine of chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires in a short period of time. The coincidence defies common sense and is too peculiar."

137 CONG. REC. S3191-02, S3240 (daily ed. March 13, 1991) (alteration in original) (quoting IMWINKELRIED, *supra* note 28, § 4.01).

151. See MAYER & ABRAMSON, *supra* note 2, at 324. That question has formed the basis for Paula Jones's theory of the case against President Clinton. See Michael Isikoff & Evan Thomas, *The Secret War*, NEWSWEEK, Feb. 9, 1998, at 36. The specter of other similar acts may have prompted the President's lawyers to move for summary judgment assuming that Paula Jones's allegations are true. Monica Lewinsky's allegations may make a jury more inclined to believe that Clinton did proposition Jones. See Jeffrey Tolan, *The Trouble with Sex: Why the Law of Sexual Harassment Has Never Worked*, NEW YORKER, Feb. 19, 1998, at 48, 52.

152. Ensuring that jurors do not misuse evidence motivates many rules of evidence including Rule 412; Rule 407, which prevents the use of subsequent remedial measures to prove culpable conduct; and Rule 411, which prevents evidence that a person is insured or uninsured to prove whether that person acted wrongfully, to name a few. The rules also allow admission of evidence when necessary despite the presence of general rules

alleged victim's past sexual behavior¹⁵³ or sexual predisposition,¹⁵⁴ subject to a balancing test provided in the rule,¹⁵⁵ in sexual misconduct civil cases.¹⁵⁶ The inclusion of "harm to the victim" as part of the

precluding such admission. For example, Rule 404(a)(1) allows an accused to offer evidence of a pertinent trait of his or her character; Rule 404(a)(2) allows the accused to offer a pertinent trait of the victim; and 404(a)(3) allows a witness's character for truthfulness to be attacked. Rule 106 allows an adverse party to introduce any other part of a writing or recording when the other party has introduced a part and fairness requires the parts be considered contemporaneously. This assumption is also reflected in case law. Justice O'Connor noted that to say that something makes no difference in law does not mean that it makes no difference in fact in *J.E.B. v. Alabama*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).

153. "Sexual behavior" is broadly defined in the Advisory Committee Note to provide protection to victims. It is not merely sexual intercourse but includes conduct which implies sexual contact, dreams and fantasies. FED. R. EVID. 412(a)(1) advisory committee's note.

154. "Sexual predisposition" provides even broader protection to victims, prohibiting dress, speech or lifestyle evidence that may obliquely imply a disposition on the part of the alleged victim. FED. R. EVID. 412(a)(2) advisory committee's note.

155. In civil cases, the ultimate decision concerning admissibility is left to the judge through the application of a balancing test, weighing the dangers of "harm to any victim" and risk of "unfair prejudice to any party" against probative value. FED. R. EVID. 412(b)(2). When assessing prejudice, the court looks at the evidence offered and assesses its impact on the jury and the fact-finding process, with the goal of arriving at the truth.

156. Rule 412 applies to evidence of sexual conduct or predisposition of *alleged victims of sexual misconduct*. The Advisory Committee Note states, "The terminology 'alleged victim' is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings." FED. R. EVID. 412 advisory committee's note.

The rule does not prohibit the use of sexual history evidence to impugn the credibility of a witness or party in a vast array of actions. In fact, it is a common defense tactic to encourage plaintiffs to withdraw their claims in a wide variety of cases not premised upon sexual misconduct. In those cases, Rule 412 would not stand as a bar. See *Schultz & Woo, supra* note 65, at A1. The only limit on the use of such evidence in cases like race discrimination or run-of-the-mill tort claims is a Rule 401 or 403 objection suggesting such evidence is irrelevant, or more prejudicial than probative. The Advisory Committee Notes do not define how broad a meaning should be given to the words "alleged victim of sexual misconduct." If a credibility question arises that may affect whether Rule 412 applies, the amendment to Rule 412 specifically determines that issues of conditional fact are to be left to the jury. *United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995). It is clear that Rule 412 extends to witnesses who were victims of alleged sexual misconduct when they testify in cases involving alleged sexual misconduct. Wright & Graham discuss this problem and offer several examples of fact patterns in which the lack of definition might pose problems:

Is the spouse of a rape victim also a "victim of alleged sexual misconduct" by virtue of the financial and psychological stress imposed by the crime? Is the sexual partner of the victim a victim if the defendant infected the victim with a sexually transmitted disease that spread to the partner? How

balancing test is perhaps the key to the effective implementation of amended Rule 412. It focuses the court on the impact of evidence on the victim. This assessment is less concerned with increasing the ability of the court to arrive at the truth than with the social policy determination that a victim of sexual assault should not be subject to harassment. If the proponent of the evidence can demonstrate that the proposed evidence is otherwise admissible under the rules and its probative value substantially outweighs the harm to any victim or of unfair prejudice to any party, the evidence is admissible. By requiring the evidence to be "otherwise admissible," the evidence must also meet the strictures of Rule 404, which precludes the use of evidence as inference of character to prove conduct in conformity with that character. The Advisory Committee¹⁵⁷ made clear that its goal was to use the rules of evidence to "remedy stereotypical thinking in the fact-finding process."¹⁵⁸ As drafted, Rule 412 substantially limits what had become a typical defense used in sexual harassment cases. The rule thwarts the attempt to imply, "she invited it." Juries will no longer be treated to lurid stories about the plaintiff's alleged sexual exploits. Without such tales, juries can evaluate a claim of sexual misconduct unhampered by that bias. Thus the same concerns that motivated the exclusion of character evidence under Rule 412 justify the need to admit character evidence under Rule 415.

about the owner of a motel who is sued for failing to protect the patron-victim against rape and who loses business as a result of unfavorable publicity? Is the person falsely accused of sexual misconduct a "victim of sexual misconduct"?

23 WRIGHT & GRAHAM, *supra* note 11, § 5384.1 (footnotes omitted).

157. During the development of the rules, there were recommendations from a number of different advisory committees including the Advisory Committee on Civil Rules, the Advisory Committee on Criminal Rules, and the Advisory Committee on the Rules of Evidence. In this Article I refer to the various committees by role as "the Advisory Committee" for the sake of simplicity.

158. The Advisory Committee Note to the 1994 amendment states:

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

FED. R. EVID. 412 advisory committee's note (pertaining to the 1994 amendments).

If the primary purpose of the fact finding process is to arrive at the truth, the law must assume that judges and juries act as they are, with all their inherent biases, not as one would wish them to be. Rule 415's goal is to counter the biases that make it difficult for the fact finder to follow the law.¹⁵⁹ In enacting Rule 412, Congress specifically stated that it will help in resisting pervasive stereotypes.¹⁶⁰ Once rules of evidence can be used to combat societal stereotypes, it should not matter whether the purpose is to preclude the introduction of arguably relevant evidence, as in 412, or to mandate the inclusion of other evidence, as in 415.

3. SYMMETRY

It will undoubtedly be argued that Rules 412 and 415 stack the deck in the plaintiff's favor. Rule 415 says that prior sexual misconduct is relevant and probative of behavior on the present occasion.¹⁶¹ That determination seems to directly contradict the rationale in Rule 412 that a woman's sexual history is not a good predictor of her present behavior.¹⁶² The apparent inconsistency of these premises could be claimed to render the rules asymmetrical.¹⁶³ This perceived lack of

159. Though the jury's assumption that one complaint is not enough may also be present in the criminal context, I believe the presumption of innocence should override the admission of this kind of evidence. I am persuaded by the critics of Rules 413 and 414 that these rules raise significant constitutional problems, increase the probability of conviction of innocent men, and operate in a racist and classist fashion. The defendant in a civil case, on the other hand, is not entitled to a presumption of innocence, does not risk incarceration, and the factors that result in racist application are not as present. See *supra* notes 130-33 and accompanying text.

160. See 1 SALTZBURG ET AL., *supra* note 87, at 571.

161. Under amended Rule 412, the plaintiff's allegations that a supervisor touched her behind or her breasts through clothing would be sufficient to qualify the plaintiff as a "victim of sexual misconduct," thereby protected by the rule. FED. R. EVID. 412. Furthermore, the acts constitute "sexual assault" as defined in Rule 413, thus qualifying the action as "a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault." FED. R. EVID. 415(a). This would allow a plaintiff to introduce the defendant's prior acts of sexual assault for any relevant purpose, but the defendant would be prevented from introducing the plaintiff's prior conduct to prove present behavior.

162. However, it might not be directly contradictory because Rule 412 includes an overriding justification not present in Rule 415, the concern for potential harm or embarrassment of the victim.

163. One answer to this "lack of symmetry" might be that the behaviors are not symmetrical. Rule 415 allows the admission of prior sexual assault to prove a number of unfavorable determinations for the defendant, ranging from the fact that he did the act in question to proof of knowledge of the employer. Such evidence is unequivocal. It can never be used to support a defendant's claim. Indeed the defendant could not offer prior "good" acts to rebut, since that would violate Rule 404(b). Rule 412 concerns itself with

symmetry may have an impact on the judicial decisionmaker.¹⁶⁴ If a

prior sexual acts to prove consent or welcomeness in a case that is now a claim of rape or harassment. Such prior acts are at best equivocal. They could be offered by either party: the defendant could offer them to show that the alleged victim is the kind of person who is likely to enjoy sexual activity and therefore welcomed this attention; the plaintiff might offer them to rebut the claim that she is making a false accusation by showing that she has enjoyed sexual activity in the past without claiming rape or harassment. That is, if the victim had twenty instances of consensual sex similar to the case at bar, in the absence of other evidence of motivation, "the most reasonable inference is that she claimed rape this time because she was raped." 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 584 n.51. Given that this evidence can be used to support and detract from the plaintiff's claim, it arguably should be treated differently from prior acts of sexual assault by the defendant. See Park, *supra* note 126, at 277-78 (noting difference between a defendant's prior sexual misconduct and a victim's prior sexual history).

Karen Fingar addresses this lack of symmetry by pointing out that these are very different behaviors. The evidence of a victim's past history is "normal" sex and thus has very little probative value in a rape case. Sex offenders, however, demonstrate deviant behavior, thus placing the accused in a small class of depraved sex offenders and making the evidence highly probative of his guilt. Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 545 (1996). This analysis fails to account for the "round up the usual suspects" phenomenon. See *supra* notes 124-25 and accompanying text.

The sponsors of Rule 413, 414, and 415 characterized the argument that this rule was inconsistent with Rule 412's rape shield as "not well-founded." 137 CONG. REC. S3241 (daily ed. Mar. 13, 1991). They noted that "[t]he rules of evidence do not generally aim at a superficial neutrality between rules of admission affecting the victim and defendant" when policies argue for treating them differently. *Id.* They argued that the prior sexual behavior of the victim has little probative value in predicting whether she consented to the charged sexual acts. "In contrast, evidence showing that the defendant has committed rapes on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge." *Id.* The sponsors added that rape shield laws further the important purpose of encouraging victims to report rapes. Such public purpose does not extend to the defendant. One may find the legislative justification persuasive in the criminal arena, when a victim is merely a witness in the case. In a civil case, the victim is the moving party and the defendant is there at her instigation. Finally, the sponsors point to the goal of safeguarding the privacy of rape victims. They note that her private sexual acts are quite different from the prior violent sex crimes of the defendant which he has no legitimate interest in suppressing. *Id.*

Once again, these justifications are framed as if Rule 415, the civil application of Rules 413 and 414, does not exist. In a civil case, some justifications lose their persuasiveness. Although a plaintiff may be offering evidence of the defendant's prior act of rape to assist in the proof of her case, more often the prior acts will be of a more equivocal nature. Furthermore, these justifications assume a guilty defendant and an innocent victim. That may be, of course, the issue before the court, and such an approach may be generally appealing when the defendant is accused of child molestation or a violent stranger rape. However, when the plaintiff is an employee and one of the defendants is her corporate employer, assumptions of guilt are less intuitive.

plaintiff seeks to introduce the defendant's history of sexual assault, a court might be less willing to exclude the plaintiff's sexual history out of a sense of perceived fairness.¹⁶⁵ A plaintiff might therefore choose not to seek this kind of information for fear that it will increase the likelihood of a wholesale attack on her background. The potential that Rule 415 might undermine Rule 412 could be the most persuasive justification for abandoning this foray into character evidence. There needs to be a compelling reason for this apparent asymmetry.¹⁶⁶

Indeed, there is. Both Rule 412 and Rule 415 are geared toward reducing fact finder bias. Rule 412 does not rest on the assumption that sexual character evidence is irrelevant in predicting present behavior. It is premised on the idea that courts should not tolerate wholesale attacks on the sexual character of a person to encourage the fact finder not to believe that person. It is designed to undercut bias that jurors bring to the fact finding process. Rule 415 is an important companion to Rule 412. It is also concerned with fact finder bias. Instead of precluding evidence that invites such bias, Rule 415 ensures that the rules of evidence do not preclude evidence that would counteract that bias.¹⁶⁷ Rules 412 and 415 can be used to cleanse the fact finding process of biases that have

164. The legislative history of Rules 413, 414, and 415 noted that the presence of rape shield laws have "given rise to an argument that it would be unfair or inappropriate to be more permissive in admitting evidence of the commission of other sex crimes by the defendant." 137 CONG. REC. S3239 (daily ed. Mar. 13, 1991).

165. The lack of symmetry is highlighted by the fact that rulings on proposed 412 and 415 evidence will occur at the same time, either through motions for protection order at the discovery stage or, as mandated by both rules, after mandatory pre-trial disclosure and at pre-trial hearings under the rules of civil procedure.

166. Rule 415 allows a plaintiff to offer evidence of prior acts of sexual assault to show action in conformity but does not allow the defendant to rebut that evidence with evidence tending to show that the defendant is not the kind of person who engages in sexual assault. This particular symmetry problem seems troubling on its face. In fact, the Judicial Conference identified it as one of the problems with the rule and suggested that specific provisions be adopted to expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal. *Report of Judicial Conference*, *supra* note 57, at 54. Practically, however, a defendant is unlikely to seek to offer such evidence. Rebuttal evidence lacks specificity and will open those witnesses to cross examination about their knowledge of the previously admitted evidence of sexual assault. A strategic defendant will be unlikely to want that evidence reiterated.

167. Some might argue that this problem could be remedied through the use of an instruction to the jury. Such an instruction might say that the jury should draw no conclusions from plaintiff's failure to produce prior similar acts by the defendant. Such a solution is unsatisfactory, however. First, it is unlikely that a defendant would agree to such an instruction treating it as tantamount to "Don't think about elephants." Second, an instruction would be litigant initiated. The Federal Rules provide a legislated response to a societal problem that is consistent with the goal of remedying bias in the courtroom.

reinforced the asymmetry of power and powerlessness in matters of sex.¹⁶⁸ Both of these rules assist the trier of fact in focusing on the behavior of the alleged perpetrator, rather than indulging in stereotypic beliefs that women cannot be believed when making claims of sexual misconduct. The result is a potentially powerful tool to combat long-held stereotypes that have infected sexual misconduct cases: that the victim either invited the treatment, or deserved it, or is not to be believed without sufficient corroboration.

While most of the criticism of these new and revised rules has focused on the potential harm of admitting prior acts evidence, the real problem with Rule 415 is that it imposes inadequate limits on the admission of such evidence. The plain meaning of the rule suggests that a plaintiff can introduce any sexual character evidence minimally relevant to the issues before the court, as long as that behavior meets the broad definition of sexual assault. In essence, a plaintiff is invited to paint the defendant as a "bad man" in hope of enticing a jury to find the facts of the present case in her favor. So construed, Rule 415 goes too far.

B. Proposed Coverage of Rule 415

1. PRIOR CONDUCT

No change in Rule 415 is necessary to allow the admission of prior acts of offensive sexual touching. Nevertheless, unless the rule is construed more narrowly, Rule 415 evidence suffers from the same

168. Susan Estrich identified how evidence rules functioned as a "one-way ratchet" against women in *Sex at Work*. Estrich, *supra* note 43, at 849. Courts were more than willing to admit evidence of a woman's dress, fantasies and sexual history to assess her credibility but at the same time to preclude evidence of her alleged harasser's prior acts of sexual harassment. She argues that the idea that we should be egalitarian about sexual history evidence enhances the asymmetry of power and powerlessness inside the workplace. *Id.* Her suggestion for approximating symmetry is consistent with my proposed revision of Rule 415:

So if there is to be symmetry—and I have yet to read an opinion embracing a one-way ratchet favoring women—it must be of a more limited kind. Lines must be drawn to limit the admissibility of evidence in order to protect women, even if those legal parameters also protect men. We must draw evidentiary lines at the workplace which render purely personal life irrelevant. We must draw lines between sex and aggression which make evidence of the latter admissible, even if the line between the two is an artificial one. I want to know if the man has been prosecuted or sued for rape elsewhere, or arrested for domestic assault, and I want to know even if the cost of knowing is also asking whether the woman has ever complained of rape.

Id. at 850.

problems that prompted the need for Rule 412: it is overinclusive. Instead of making sexual character evidence admissible for any relevant purpose, admissibility should be limited to evidence offered to corroborate the plaintiff's story. Concomitant with that narrowing, the evidence must also *be* corroborating—that is, the sexual character evidence must be substantially similar to the act alleged.

Courts could look to several factors to determine the probative value of the evidence. These factors include:

- similarity in type between the alleged events and prior events;
- similarity in relationship between alleged perpetrator and alleged victim in each circumstance;
- similarity in settings in which the events took place;
- proximity in time; and
- frequency of other acts.¹⁶⁹

Such a construction of Rule 415 would reap the benefits of propensity evidence without undermining Rule 412.¹⁷⁰ Although still

169. These factors are similar to those proposed by the Judicial Conference when it offered alternative language for Congress to adopt in lieu of Rule 413, 414, and 415. The proposed alternative Rule 404 included the following language:

- (A) In weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider:
- (i) proximity in time to the charged or predicate misconduct;
 - (ii) similarity to the charged or predicate misconduct;
 - (iii) frequency of the other acts;
 - (iv) surrounding circumstances;
 - (v) relevant intervening events; and
 - (vi) other relevant similarities or differences.

Report of Judicial Conference, supra note 57, at 55. One could argue that courts could import this narrowing through the application of Rule 403 and therefore no change would be necessary. This argument may be undercut by Congress's rejection of the Judicial Conference's suggestion of how Rule 403 should be used. Even if these factors could be used now with Rule 415 as drafted, this does not take care of the rule's underinclusive coverage. See *infra* note 175 and accompanying text.

170. That such a reading would provide a bit more symmetry is borne out by evidentiary rulings under Rule 412. Defendants can "corroborate" their stories by offering evidence of "welcomeness" or, if such evidence is available, showing that the plaintiff made a similar claim of sexual harassment in the past that was proven to be

relying on general propensity, using this kind of evidence to corroborate a victim's story is considerably narrower than admitting sexual character evidence merely to imply that this is a bad person who should be found liable because he is so bad.¹⁷¹ For example, thirty-year-old allegations of statutory rape or more recent allegations of child molestation would not be usable in a present case of sexual harassment if these factors are used.

The suggested refinement of Rule 415 would limit evidence of corroboration to substantially similar behavior by the alleged perpetrator.¹⁷² This requirement of similarity not only provides useful evidence of corroboration but it also has considerably more probative value than any general evidence that the defendant is a "bad guy." Social science evidence suggests that the predictive value of behavior depends on its similarity to the alleged activity.¹⁷³ This modification of Rule 415

unfounded. It is also worth noting that facial symmetry may not be symmetry in fact. Susan Estrich writes about symmetry in evidence rules:

A rule treating evidence of a woman's other sexual relationships the same as such evidence about the man may seem egalitarian; the impact of such evidence may not be. Men with active sex lives are normal, desirable, successful. Women are loose, easy, unworthy. Men are "Don Juans." Women are whores.

Estrich, *supra* note 43, at 849.

171. See IMWINKELRIED, *supra* note 28, § 5.05. This narrowing would be applied when Rule 415 evidence is offered on a general propensity theory of relevance. Otherwise prior acts of sexual assault could continue to be used when a "non-propensity" theory of relevance is articulated. Courts have allowed prior acts evidence to prove substantive issues when offered for a non-propensity purpose. Any time prior acts are admitted under 404(b), they have the additional effect of bolstering the plaintiff's credibility, but Rule 404 would not allow a plaintiff to argue that effect to the jury. For example, a plaintiff's attorney could argue that the prior acts of similar conduct demonstrate a motive or intent on the part of the defendant to engage in sexual harassment. The attorney could not argue that those prior acts support the plaintiff's story of what happened and lend credibility to her claims. Rule 415 would allow arguments to the jury that appeal to the 404(b) "non-propensity purpose" and the Rule 415 general propensity purpose.

172. Imwinkelried suggests that when courts evaluate the probative value of prior misconduct evidence, they should determine how clearly the prior act has been proven, how probative the evidence is of the material fact, and how seriously disputed the material fact is. IMWINKELRIED, *supra* note 28, at ch. 8.

173. Davies, *supra* note 131. Davies points out that commentators' suspicions of jurors' inability to use the evidence fairly and reliably are not well-founded. She states:

Where the prior behavior or a character trait is described with sufficient particularity and where it occurred in an analogous context, it may be highly probative of the conduct in question. . . . Although misuse of character evidence admitted for limited purposes is probably inevitable, the notion that jurors overvalue the probativeness of character or make errors because of their inability to make accurate assessments of character gains little reinforcement from contemporary work in the social sciences.

draws on that insight. For example, given the similarity in circumstances and situation, a plaintiff should be able to show a defendant's character as a sexual harasser through the testimony of other employees in other workplaces who also experienced offensive touching. She might also draw parallels between the defendant as a customer in a bar fondling his server and the defendant's and plaintiff's relationships within the office. The testimony would be probative of his tendency to assume sexual access to subordinate females, thus corroborating the plaintiff's assertion that he sexually harassed her on the claimed occasion.

The application of the factors allows room for argument. For example, domestic violence could at first appear to lack similarity to

Id. at 533.

Psychologists disagree about whether the inferences sought by the use of general propensity evidence are sound. See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987); Miguel Ángel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1041-60 (1984). Proponents of admission of this evidence typically rely on trait theory to justify the prior acts' probative value. Trait theory is the belief that people are made up of a collection of traits and those traits determine their behavior on any given occasion. It has been generally discredited. Davies, *supra* note 131, at 513. Arguably Rules 413 and 414 are not needed to admit this similar evidence because it may be admissible under 404(b). Rule 404(b) allows the admission of prior act evidence if it is so similar to the charged conduct that it is distinctive. Under those conditions, it may be relevant to identity or intent if those issues are in contention. Thus one need not ascribe to trait theory in order to find probative value. Even if such evidence reliably predicts future behavior, many critics have argued that the research does not appear to justify singling out prior sexual offenses for admission but not other kinds of offenses.

Bryden & Park discuss studies showing that the recidivism rate for sex offenders is no higher and may be lower, than for other crimes. See Bryden & Park, *supra* note 15, at 572. For example, a 1989 Bureau of Justice study of 100,000 offenders over a three year period indicated that the recidivism rate was lower for sex offenders than most other criminals (31.9% for burglars, 24.8% for drug offenders, 19.6% for robbers, 7.7% for rapists, 2.8% for murderers). The authors note that these figures may be under-represented because of the low reporting rate for sex offenses. Nevertheless, this may also be true of other types of criminals, such as "purse snatchers, illegal gamblers, shoplifters, recipients of stolen goods, drunken drivers, and drug offenders." *Id.* at 573. That is, it is not clear that a person who has engaged in sexual misconduct in the past is more likely to engage in it on a subsequent occasion than a non-sex offender is likely to repeat the same non-sex offense. The authors discuss the debate among psychologists concerning trait theory (suggesting that human beings possess certain traits that make their behavior consistent in similar situations), situationism (suggesting that human behavior is situationally specific and that character traits do not produce cross-situational stability of behavior), and interactionism (emphasizing the need to examine a person's relevant traits and the specifics of the situation in predicting behavior). *Id.* at 561-62. The unique quality of sexual misconduct cases, however, may justify singling out sex offenses for special treatment.

charges of sexual harassment. However, an argument could be made, depending on the factual circumstances, that the defendant's power relationship to his subordinate shares many of the characteristics of the power relationship between a husband and wife, and therefore, the domestic violence may corroborate an alleged sexual harassment victim's claims. These factors help guide the courts in identifying whether the evidence can be used to corroborate the plaintiff's claim. In addition, courts can exercise their supervisory power to exclude evidence under Rule 403. The mere fact that the evidence is offered for general propensity purposes should not be deemed unfair prejudice. However, other Rule 403 considerations may still arise.¹⁷⁴

2. SEXUAL MISCONDUCT CLAIMS

If Rule 415 evidence is limited to the defendant's prior acts that corroborate, it is underinclusive in its definition of sexual misconduct. At present, Rule 415's definition of covered acts, though broader than perhaps its drafters anticipated, does not include the vast array of non-physical sexual misconduct that constitutes sexual harassment. For example, as presently drafted, Rule 415 would not allow evidence that the defendant had propositioned or made sexual comments to other women because that does not involve sexual touching.¹⁷⁵ The better solution is to narrow Rule 415 so sexual character evidence could only be used for corroborative or credibility purposes, while expanding the list of behaviors admissible under Rule 415 to include nonphysical sexual misconduct such as comments and propositions. Rule 412 applies in cases involving alleged sexual misconduct.¹⁷⁶ Deciding whether an act constitutes sexual misconduct under Rule 412 has not proven to be too obscure for the courts.¹⁷⁷ Expanding the definition of corroborating evidence would make Rule 415 more consistent with the purpose of countering the "one charge of sexual misconduct is not enough" biases found in a jury.

174. See *supra* notes 117-20 and accompanying text.

175. For example, sexual harassment cases are not brought by women who have sex with their supervisor and then get promoted. The women who say "no" bring the cases. Such prior "consensual" sexual relationships between a supervisor and women in the office would not constitute "sexual assault" for purposes of Rule 415. Such evidence would be necessary for the plaintiff to show that she was disadvantaged due to her unwillingness to have sex with the supervisor.

176. The protection of Rule 412 only arises in proceedings involving alleged sexual misconduct. FED. R. EVID. 412(a).

177. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5384.1.

Many substantive claims in sexual harassment cases hinge on credibility.¹⁷⁸ To prove sexual harassment under Title VII, a plaintiff must either prove that a sexually harassing work environment exists or that submission to sexual conduct was made a condition of receiving a tangible employment benefit. To prove hostile environment, the plaintiff must prove that sexual harassment within the workplace is sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive working environment. The plaintiff's credibility necessarily affects a juror's assessment of these issues.¹⁷⁹ Rule 415 evidence might be useful to bolster the plaintiff's credibility when she attempts to show that the offense was:

- *objectionable to a reasonable person.*¹⁸⁰ A plaintiff's assertion that she was offended may be undermined by the jury's bias. She may be assumed to be unbelievable or hypersensitive. Evidence of the defendant's prior sexual misconduct lends credibility to her claims.
- *gender-based.*¹⁸¹ A defendant might argue his acts

178. Rule 415 as narrowed would not supersede evidence offered under Rule 404(b). Already many courts have found rationales to allow evidence of prior conduct of the alleged perpetrator to show elements of a sexual harassment claim. For example, in addition to the issues of proof outlined *infra* notes 180-83 and accompanying text, the plaintiff might offer the defendant's sexual character evidence to address whether the employer had actual or constructive knowledge of the conduct. Such prior acts evidence may also be used to show that the corporate entity should have known of the supervisor's harassment in order to establish liability for "hostile environment" purposes. If a plaintiff can produce several employees willing to testify about prior acts, it reduces the likelihood the defendant's claims of ignorance are believable. *See, e.g., Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264 (8th Cir. 1993). If an employer knows of the defendant's proclivities, the plaintiff might claim the employer had constructive notice of harassment. In *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 (10th Cir. 1995), the court found constructive knowledge as arising from knowledge of the harasser's conduct toward other employees "that is similar in nature and near in time" to the harassment of the plaintiff. *Id.* at 784. Because this evidence would be offered on a non-propensity theory, i.e., notice, Rule 415 would be unnecessary to ensure its admissibility.

179. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

180. The plaintiff bears the burden of proving that the conduct was offensive. *Id.*; *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1499-1501 (M.D. Fla. 1991); *EEOC v. Gurness Inn Corp.*, 48 Fair Empl. Prac. Cas. (BNA) 871, 878 (N.D. Ill. 1988), *aff'd*, 914 F.2d 815 (7th Cir. 1990).

181. Courts have allowed the use of prior acts evidence under Rule 404(b) to prove motive. *See Wendorf v. Metropolitan Life Ins. Co.*, 47 Empl. Prac. Dec. (CCH) 38,316 (E.D.N.Y. 1988); *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438 (S.D. W. Va. 1985); *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981); *Halpert v. Wertheim*

were not motivated by the plaintiff's sex but were merely horseplay directed toward everyone, male or female, in the workplace. This essentially is an argument that she is overreacting to workplace pranks and "reading in" a gender motivation. The defendant's prior acts of sexual misconduct might be offered to show a gender-specific sexual motivation under Rule 404(b). Such acts may also undercut the implication that the plaintiff was hypersensitive.

- *unwelcome*.¹⁸² The claim that the plaintiff welcomed the conduct is usually bolstered by evidence of the plaintiff's prior sexual conduct (now limited by revised Rule 412). If that proof implies the plaintiff sought the attention and is now "crying foul," or that the defendant misunderstood her purported "invitation," the defendant could be inviting the jury to indulge in impermissible stereotypes. Sexual character evidence offered against the defendant might undermine the jury's tendency to embrace the suggestion that the plaintiff is prevaricating.
- *pervasive*.¹⁸³ An aspect of the pervasiveness measure dovetails with the assessment of offensiveness. In each, the fact finder is asked to evaluate a plaintiff's assertion that workplace behavior affected her ability to work. Using Rule 415, a plaintiff could show other acts of sexual assault by the defendant within the workplace that occurred prior to her employment, and thereby bolster her assertion that

& Co., 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980); *Bennett v. Corroon & Black Corp.*, 517 So. 2d 1245 (La. Ct. App. 1987). That evidence would continue to be admissible under that theory.

182. See, e.g., *Horn v. Duke Homes*, 755 F.2d 599, 602 (7th Cir. 1985) (three women came forward to testify the same supervisor had harassed them); *Priest v. Rotary*, 634 F. Supp. 571, 574-76 (N.D. Cal. 1986) (other women testified to show that the restaurant owner had engaged in a pattern of sexual harassment).

183. To prevail in a claim of a sexually harassing work environment, the plaintiff must demonstrate that the harassment is pervasive. Pervasiveness is extremely difficult to prove. The plaintiff must show that the harassment is sufficient "to alter the conditions of [her] employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Even though courts have allowed such evidence prior to the adoption of Rule 415 to show pattern or practice, the new rule expands admissibility.

such activity was pervasive enough to affect the conditions of her employment.

In addition, sexual character evidence can be used to combat traditional defenses to sexual harassment complaints.¹⁸⁴ Often it is the third or fourth woman to be harassed who brings the suit. She may succeed because she has the corroboration of the others. Prior acts within the workplace before the plaintiff was employed undermine the defendant's implied assertion that he does not engage in sexually harassing activity. The behavior outside of the workplace may also be relevant. A person who engaged in sexual misconduct outside of the workplace undermines his claims that he is an "angel" in the office.¹⁸⁵ For example, a frequently seen attack is to suggest that a plaintiff's delay in complaining or failure to complain suggests she concocted the whole story.¹⁸⁶ The absence of a prompt complaint reinforces the fact finder's bias to disbelieve the complainant. Sexual character evidence regarding the defendant corroborates the plaintiff's story and helps counteract credibility damage caused by the absence of prompt complaint.

As with all rules that attempt to cope with how things are rather than how one wishes them to be, using the rules to show corroboration might

184. Prior to the adoption of Rule 415, some courts would admit evidence of similar complaints of employees that occurred during the same time period as the events alleged by the plaintiff to establish a pattern of sexual harassment. The majority rule for the circuits is to review the "totality of the circumstances" to determine if the workplace is abusive. This has allowed some courts to look at similar acts of sexual harassment during the plaintiff's employment. *See, e.g.,* Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988); Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988). For a comprehensive discussion of the analysis of hostile work environment cases, see Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*, 21 N.Y.U. REV. L. & SOC. CHANGE 357 (1994). Others would not allow such a showing. *See, e.g.,* Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984); Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982); Moorhouse v. Boeing Co., 501 F. Supp. 390 (E.D. Pa.), *aff'd without opinion*, 639 F.2d 774 (3rd Cir. 1980); Kresko v. Rulli, 432 N.W.2d 764 (Minn. Ct. App. 1988).

185. *See* Estrich, *supra* note 43, at 849.

186. Pervasiveness claims are often undermined by evidence that the woman did not promptly or clearly complain of the treatment. Defendants posit that the harassment could not have been so severe as to alter the conditions of her employment. *See, e.g.,* Sand v. George P. Johnson Co., 33 Fair. Empl. Prac. Cas. (BNA) 716, 727 (1982); Walter, 518 F. Supp. at 1314-15. Commentators have suggested that to believe this logic, the fact finder must ignore power imbalances in the workplace, the lack of availability of a meaningful or effective complaint process, and the woman's fear that a complaint may result in harsher treatment or the loss of a much-needed job. *See* Estrich, *supra* note 43, at 845-47.

risk reinforcing the biases the rules purport to cure.¹⁸⁷ Advocating the admission of such evidence is not without its problems. For example, courts might come to expect such evidence. At this point, there is no data on how many alleged sexual harassers have histories of engaging in similar behavior. Defendants might attempt to argue the lack of corroborating evidence to the fact finder. After such an argument, juries might consider its absence significant. Courts could begin to look for prior evidence of sexual assault as a part of the proof of the case, thus raising the threshold that plaintiffs have to meet to survive a summary judgment motion.¹⁸⁸ The need for corroboration might be intensified by

187. This is not a new problem and it comes up in other contexts. For example, the same argument is made in the affirmative action debate over color blindness. The failure to be color blind may reinforce some of the same bias that prompted a need for a remedy, yet being color blind may reinforce the status quo that prompted the need for a remedy. See Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993). Richard Wasserstrom identifies three perspectives that complicate meaningful debate about how the law should address problems of bias. The first of these perspectives concentrates on what in fact is true in culture; the second is concerned with the way things ought to be; and the third looks to the means by which the ideal may be achieved. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

188. Another effect of these rules may be to create an incentive for defendants to go on the offensive. If a defendant alleged that the plaintiff was the sexual aggressor, that in this instance she had initiated the sexual touching it may affect the admissibility of defendant's alleged prior sexual assaults. Arguably he would be able to claim protection under Rule 412 and perhaps be able to discover and admit evidence of the plaintiff's prior acts that may constitute sexual assault under Rules 413 and 415.

To claim protection under Rule 412, one need only be an alleged victim of sexual misconduct. The defendant could not gain victim status by alleging that he has been falsely accused of sexual misconduct. FED. R. EVID. 412 advisory committee's note. The note says that if a person sues a newspaper for defamation for falsely claiming that the plaintiff consented to a violent sexual encounter, the plaintiff cannot reasonably be characterized as a victim. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5384.1. The rule requires more than merely suggesting that the plaintiff initiated the relationship and therefore "welcomed" it. The "sexual aggressor" defense has been raised to try to prevent limitations on discovery in *Sanchez v. Zabihi*, 166 F.R.D. 500, 501 (D.N.M. 1996). The court interpreted the defense as an assertion of welcomeness, and limited discovery by time and workplace without deciding admissibility at trial. *Id.* The defendant asserting such defense would have to allege that the sexual contact was unwanted. If he could make a good faith showing of unwanted sexual contact, he might fit the definition of "alleged victim of sexual misconduct" anticipated by Rule 412. The Advisory Committee Notes say that the word "alleged" is used "because there will frequently be a factual dispute as to whether sexual misconduct occurred." FED. R. EVID. 412 advisory committee's note. This defense need not appear in the pleadings. *Id.* The determination of whether the defendant fits the characterization as an "alleged victim of sexual misconduct" is a matter of conditional relevance to be decided by the jury. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5384.1. If he should be determined to be such

a rule that specifically allows such evidence to be admitted on that theory of relevance.

There may come a time when such evidence is not needed, but that time has not yet arrived. Sexual assault and harassment are such pervasive and debilitating aspects of women's lives that one cannot afford to ignore the substantial obstacle to achieving justice caused by a jury's need for corroboration. As long as one can anticipate that a juror will not believe the plaintiff unless she is backed by others with similar stories, then if such evidence is available, it should be freely admissible.

VI. CONCLUSION

In its zeal to convict child molesters and rapists, Congress has created a civil rule that might have far more impact than the criminal rules upon which it is premised. If courts follow the law as passed by Congress, Rules 412 and 415 will shift the balance of power in civil actions arising from sexual misconduct. A victim of sexual misconduct may invoke the shield of the amended Rule 412, thus precluding in greater measure than previously possible the introduction of the victim's prior sexual conduct or evidence of sexual predisposition to imply that she apparently invited, consented to, or welcomed the alleged sexual misconduct. But the alleged perpetrator of sexual misconduct may also find himself confronted with his own sexual history if the offered evidence constitutes sexual assault under the rules, which includes sexual touching permitted through fear. Under the rules as presently constructed, such evidence can be offered for whatever purpose is

a victim, all the proposed evidence of the defendant's prior sexual assault conduct would be subject to Rule 412's more rigorous balancing test. The balancing would only occur if the court should find that Rule 415 is not a rule of mandatory admissibility. *See supra* notes 72-89 and accompanying text. Given the court's dim view of the probative value of this evidence when doing the less rigorous 403 balancing, it would appear that the defendant's prior conduct would be inadmissible.

If the defendant discovered and sought to introduce evidence that the plaintiff has "sexually assaulted" others as defined in Rule 413 he would encounter significant problems. Characterizing workplace sexual activity as prior sexual assault is likely to be considerably more difficult for a supervisor than an employee. The definition of sexual assault that a plaintiff might rely upon for purposes of the rule requires that the contact be done under conditions of fear. In the employment case, that fear is generated by the power of the supervisor in the supervisor/supervisee relationship. Even if the defendant were able to show evidence that meets the definitional requirements of Rule 413, he would not be able to seek admission under Rule 415. By its terms, Rule 415 only allows the evidence of the *defendant's* prior acts of sexual assault to be used. Since the plaintiff is not the defendant, such evidence must meet the strictures of Rule 404(b). Thus, the defendant would not be able to offer alleged prior acts unless he counterclaimed for the sexual misconduct.

relevant, including general propensity: the alleged victim may offer evidence against the alleged perpetrator of prior sexual acts to show that he engages in such acts, and therefore probably engaged in those acts this time.

An analysis of recent case law suggests, however, that these changes have begun to cause a backlash. Courts are resisting character evidence and exercising their supervisory powers under Rule 403 to preclude sexual character evidence under Rule 415. Yet victims of sexual misconduct suffer now under a legal system that treats their story as unbelievable unless corroborated. Although Rule 415 is flawed, it levels the playing field for victims of sexual misconduct by allowing plaintiffs to introduce evidence to bolster their credibility. The rule should be narrowed so that relevance is limited to similar-acts evidence offered as corroboration to combat jury bias. At the same time, it should be expanded to include a wider array of sexual misconduct cases. In this way, Congress could achieve its goal of protecting the victims of sexual offenses while preserving basic fairness in the administration of trials.